123-527

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1285~~. 835 509 215

RICHARD B. CHAPMAN, PLAINTIFF IN ERROR,

vs.

EDWARD K. GOODNOW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED MARCH 18, 1885.

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a *Pleas in the Supreme Court of Iowa.*

Be it remembered that on the 17th day of November, 1883, there was filed in the office of the clerk of the supreme court of Iowa an "abstract," the same, together with endorsements thereon, being in the words and figures following, to wit:

1 (Endorsed:) "Rec'd copy of this abstract this 30th of Nov., 1883. Theo. Hawley, def't's att'y."

Supreme Court of Iowa. December Term, A. D. 1883—Des Moines.

EDWARD K. GOODNOW
vs.
SAMUEL G. WOLCOTT,

EDWARD K. GOODNOW
vs.
R. B. CHAPMAN.

No. 10772.

Appeal from the judgment of Webster district court.

George Crane, for appellant.
Theodore Hawley, for appellee.

Appellant's Abstract.

July 26th, A. D. 1880, the plaintiff filed his petition in equity in said circuit court of Webster county, stating his cause of action as follows:

The plaintiff, Edward K. Goodnow, complaining of the defendant, Samuel G. Wolcott, says:

2 Par. 1. That on or about the 15th day of May, 1856, the Congress of the United States, by an act approved on that date, granted and conveyed to the State of Iowa, in trust, to aid in the construction of a railroad from the city of Dubuque, on the Mississippi river, across said State to a point on the Missouri river near Sioux City, every alternate section of land designated by odd numbers for six sections in width on each side of said road, and in case there was not enough land within six sections subject to such grant to make the full six sections of land for each mile of road to be constructed, then that said State should be entitled within fifteen miles on either side of said railroad to as much land in alternate sections or parts of sections as should be equal to the amount of lands in odd-numbered sections within the said six-mile limits as were not subject to the operation of said grant, and that to make a full grant of six sections per mile said State became entitled to and received a proper certificate for all the odd-numbered sections and parts of sections within the said fifteen-mile limits that had not been sold to or otherwise appropriated by the United States, and to which the rights of pre-emption had not attached.

Par. 2. Plaintiff further says that on or about the 14th day of July, 1856, the said State of Iowa, having duly accepted said grant and undertaken the trust therein declared by an act approved on that date, granted all of said lands to the Dubuque & Pacific Railroad Company, a corporation duly organized under the laws of said State on condition that said company would build the railroad contemplated in said act of Congress.

Par. 3. That afterwards, in August, 1860, the said Dubuque & Pacific Railroad Company sold, transferred, and conveyed its said railroad and all its property of every kind and nature, including all its right, title, and interest in and to the lands given or granted to it by said State of Iowa to aid in the construction of said railroad, to the Dubuque & Sioux City Railroad Company, a corpora-
3 tion duly organized under the laws of Iowa, which said last conveyance was afterwards recognized, approved, and assented to by the State of Iowa, a copy of which, marked Exhibit A, is attached to this petition.

Plaintiff further says that said railroad companies duly constructed said railroad according to the terms and requirements of said act of Congress, and prior to the year 1861 earned all the lands designated or covered by the language of the granting clause of said act of Congress, and lying or being situated on the east side of the Des Moines river, in Webster county, Iowa.

Par. 4. Plaintiff further says that from 1860 to 1873 the said Dubuque & Sioux City Railroad Company, under and by virtue of said grant of lands and the construction of said railroad, honestly and in good faith believed that it was the absolute owner of and held a good and valid title during all the years of 1861 and 1862, and till the 12th day of November, 1863, to the following described lands, to wit:

The northwest ¼ section 1, township 88, range 28; east ½ southwest ¼ section 7, township 87, range 27; east ½ section 17, township 88, range 27; all in Webster county, Iowa.

All of which lands are designated by odd numbers and are within the six and fifteen mile limits of said railroad, and without which said railroad grant did not amount to six sections per mile of railroad built.

But in the year 1873 the Supreme Court of the United States, in a suit therein pending for the purpose of testing the right and title of the Iowa Homestead Company, a grantee of the said Dubuque & Sioux City Railroad Company, to the lands aforesaid, decided finally that neither said railroad company nor said Homestead Company was the owner thereof, and never had any right or title thereto, since which time neither of said companies has claimed to be the owner of said lands or any part thereof.

4 Par. 5. That during the continuation of said belief and claim of ownership the said Dubuque & Sioux City Railroad Company paid to Webster county, a municipal corporation under the laws of Iowa, and within whose territorial limits said lands are situated, the taxes which were duly assessed and levied upon said

lands by said county—that is to say, the amounts at the dates following and for the following years respectively:

For 1861, paid Oct. 31st, 1866	$175 00
For 1862, paid Dec. 9th, 1863	87 50
Por 1863, paid Jan. 20th, 1864	87 50

Par. 6. Plaintiff further says that the taxes so assessed and levied upon said lands became and were a valid and binding lien thereon in favor of said county, which said lien was superior or paramount to all other liens or incumbrances thereon.

Plaintiff further says that long prior to the assessment and levy of said taxes upon said lands the said defendant herein became and was the real owner thereof, and ever since has been such owner, but of defendant's said ownership said Dubuque & Sioux City Railroad Company had no knowledge or notice at the time of constructing said road, nor till long after the payment of the taxes aforesaid.

Par. 8. Plaintiff further says that said defendant has never paid to said county the taxes aforesaid, or any part thereof, and that said county has always heretofore refused, and still refuses, to refund to said last-named railroad company or its assigns the taxes so paid to said county by said railroad company, as hereinbefore alleged.

Par. 9. Plaintiff further says that said defendant is now and always has been a non-resident of the State of Iowa.

Par. 10. Plaintiff further says that the said Dubuque & Sioux City Railroad Company has assigned, transferred, and set over to the said plaintiff all its right, title, and claim for all of said taxes, and the right to recover or obtain the same from the said defendant, a copy of which assignment, marked Exhibit B, is hereto attached and made part of this petition.

Par. 11. Wherefore plaintiff asks judgment against the defendant for the sum of four hundred and fifty dollars, interest and cost of suit; that the same be made a special lien on the lands above described, and for such other and further relief in the premises as equity and good conscience may require, and to this court may seem meet.

GEORGE CRANE,
Attorney for Plaintiff.

EXHIBIT B, referred to in the petition.

This agreement witnesseth, That in consideration of the covenants and agreements hereinafter mentioned, and to be kept, observed, and performed by Edward K. Goodnow, of the city and State of New York, the Dubuque & Sioux City Railroad Company, a corporation organized and existing under the laws of the State of Iowa, has assigned, transferred, conveyed, and set over, and by these presents does assign, transfer, convey, and set over, unto the said E. K. Goodnow all right, title, claim, or demand, or cause of action either in law or equity, which said railroad company may have against any person, company, or corporation on account of or by reason of its payment to Webster county, in the State of Iowa, of any taxes

assessed or levied by said county upon lands situated within the territorial limits thereof, and in which said railroad company heretofore had or claimed to have an interest or title; and especially all claims, demands, and rights of action in law or equity which said railroad company may have or hold against any person, company, or corporation by virtue of said railroad company's having paid or handed over in and for 1861, 1862, 1863, 1864 to said Webster county the taxes assessed or levied by said county upon the lands, or any part thereof, formerly claimed by said railroad company as part of the lands granted by Congress to aid in the con-
6 struction of its railroad, and located within five miles of the Des Moines river in said county, but which were finally adjudged by the courts to be no part of said land grant; and does hereby authorize the said E. K. Goodnow to enforce said claims, demands, or rights of action by suits in his own name.

In consideration whereof the said E. K. Goodnow hereby agrees to use or exercise reasonable care and diligence to enforce said claims, demands, or rights of action, and, after deducting all costs and expenses incurred in so doing, to hold the proceeds or amounts collected in trust for the use and benefit of the parties owning the same.

Signed by the respective parties hereto.

D. & S. C. R. R. Co. E. K. GOODNOW.

DUBUQUE & SIOUX CITY R. R. CO.,

[SEAL.] By M. K. JESUP, *President.*

J. B. DUMONT, *Sec.*

STATE OF NEW YORK, *New York City and County:*

On this 8th day of April, A. D. 1881, before me, a notary public, in and for said county, personally came M. K. Jesup, president of the Dubuque & Sioux City Railroad Company, and John B. Dumont, secretary of said company, to me personally known to be the identical persons whose names are affixed to the above instrument as grantors and as officers of said company, and acknowledged the same to be their voluntary act and deed and the voluntary act and deed of said railroad company for the uses and purposes therein mentioned.

Witness my hand and official seal.

[SEAL.] J. C. FRENCH,

Notary Public, Kings Co.

Cert'f- filed N. Y. Co.

June 4th, 1881, the defendant filed his answer in the words following:

7 Comes now the defendant, and for answer to the petition of plaintiff herein says:

I.

That he denies each and every allegation contained in the first, second, and third paragraphs thereof.

II.

Further answering, defendant denies each and every allegation contained in the fourth paragraph of plaintiff's petition, except as herein admitted. Defendant admits that in the year 1873 the Supreme Court of the United States, in a suit therein pending for the purpose of testing the rights of the Iowa Homestead Company, a grantee of said railroad company to the land in said petition described, decided that neither said railroad company nor said Homestead Company was or ever had been owner or had any right or interest in said lands, and that neither of said companies had or ever had any right, title, or interest in said lands or any part thereof.

III.

Further answering, defendant says that he denies each and every allegation contained in the fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of plaintiff's petition, except as hereinafter expressly admitted.

IV.

The defendant, further answering, avers that at the time of the assessment and levy of the alleged taxes upon the lands mentioned and described in said petition for the years 1861 and 1862, said lands belonged to the United States; that the title thereto was in the United States, and that said lands were not subject to taxation by Webster county for any purpose for said years, and that if any taxes were assessed and levied thereon for the years aforesaid the same were not a valid or binding lien upon said lands.

8 V.

Further answering, defendant avers that if said plaintiff or his assignor had any right or cause of action against defendant for the recovery of said taxes, or any part thereof, said cause of action arose or accrued to said plaintiff and his assignor more than five years before the commencement of this action, and that the same is now barred by lapse of time.

VI.

Further answering, defendant avers that the said Dubuque & Sioux City Railroad Company paid said taxes to said Webster county voluntarily and without the request, knowledge, or consent of this defendant, and with full knowledge of the facts and circumsiances upon which its alleged claim of title to said lands was founded.

VII.

Further answering, defendant avers that the said several causes of action set up in plaintiff's petition herein accrued more than six years next before the commencement of this suit, and that at all

times since the date of the payment of said taxes said defendant was and still is a citizen and resident of the State of New York, and that by the laws of the State of New York all causes of action based upon an expressed or implied promise not in writing are barred after the expiration of six years from the date when said causes of action severally accrued, and that the causes of action set out in plaintiff's petition herein are barred by lapse of time under the laws of the State of New York.

VIII.

Further answering, defendant avers that a large amount of the taxes so alleged to have been paid by said Dubuque & Sioux City Railroad Company were illegal and void, for that the taxing officers of Webster county had no right or authority of law to levy
9 and collect the same. A particular statement and schedule of said illegal taxes is hereunto attached, and marked A, and made a part hereof.

IX.

Further answering, defendant says that in an action wherein the Iowa Homestead Company, the grantee of the assignor of plaintiff, was plaintiff, and The Des Moines Navigation & Railroad Company and this defendant were defendants, commenced in the district court of Webster county, Iowa, and finally determined in and by the Supreme Court of the United States, the said Homestead Company, prior to the date of the alleged assignment of the alleged cause of action, set out in the petition herein asserted, alleged, and maintained among other things the right to recover of the said defendants, and especially of this defendant, the taxes paid by the said Homestead Company upon the lands set out in the petition herein, for certain years subsequent to 1863, and that one of the issues made by the pleadings in the same was as to the right of the said Homestead Company to recover the taxes so paid by it, and that it was determined, adjudged, and found by said Supreme Court of the United States, at the December term thereof for 1872, that the said Homestead Company was not entitled to recover said taxes or any part thereof, which said determination and judgment has never been in any manner set aside, vacated, or modified, but the same remains and still is in full force and effect; and the defendants say that the assignor of plaintiff had knowledge of the pendency of said suit, and employed attorneys to prosecute the same, and that it was brought and prosecuted under the advice and direction of plaintiff's assignor, and that the plaintiff and his said assignor, The Dubuque & Sioux City Railroad Company, are barred and estopped by said judgment in the suit herein mentioned from recovering from this defendant the taxes alleged to have been paid by plaintiff's assignor and set out herein, or any part thereof.

10 X.

Further answering, defendant alleges that during the years

from 1860 to 1865, both inclusive, adverse claims of title were made to said lands, the taxes on which are in controversy herein, by the Des Moines Navigation & Railroad Company and its grantees, claiming the same under the act of Congress of August 8th, 1846, known as the Des Moines river land grant, and the Dubuque & Sioux City Railroad Company and its grantees, claiming the same under the act of Congress May 15th, 1856, known as the railroad grant, and that by reason of such adverse claims of title thereto the title was held by the General Government for the purpose of adjusting and determining with respect to said conflicting claims, and the certification thereof under said last-mentioned act was suspended until April, 1863, that the claim of title to said land by plaintiff's assignor and its grantees, therefore, did not have inception until the last-mentioned date, and said lands could not have become subject to taxation under said last-mentioned act, and their certification thereunder, had they been held to pass under the grant thereby made. Wherefore defendant says that the payment of the taxes thereon for said years by plaintiff's assignor was both voluntary and officious.

THEO. HAWLEY,
Defendant's Attorney.

Afterwards defendant filed an amended answer as follows:

Further answering, defendant says that it is not true that the question as to the title and ownership of the lands mentioned and described in the plaintiff's petition as between the assignor of the plaintiff and this defendant was not finally decided until 1873, and withdraws so much of his answer heretofore filed herein as either expressly or by implication admits that the same was then finally decided, and avers that the same was definitely and finally decided
11 at the December term, 1866, of the Supreme Court of the United States in the case of this defendant *vs.* The Des Moines Navigation & Railroad Company, and Burr *vs.* the same company, reported in 5 Wallace, pages 681 and 689.

Dec. 21st, 1881, plaintiff filed his reply in the words following:

And now comes the plaintiff, and for reply to the answer of defendant, Samuel G. Wolcott, says that the decree or judgment set up therein as an adjudication of the rights of the plaintiff is and was wholly void, for the reason that the courts of the United States had no jurisdiction of said suit, and no legal power or authority to decide the issues or render a decree therein.

And plaintiff denies each and every allegation in said answer contained, and renews the prayer heretofore made.

GEORGE CRANE,
Attorney for Plaintiff.

On Oct. 2, 1883, this cause coming on for final hearing, the plaintiff, to maintain the issues on his part, read in evidence the following agreed statement of facts:

For the purpose of the trial of the above-entitled suit it is hereby stipulated and agreed:

First. That the defendant, Samuel G. Wolcott, is now and always has been a non-resident of the State of Iowa.

Second. That the county of Webster, in the usual and formal manner, levied and assessed upon the lands mentioned in plaintiff's petition for the years named the several amounts of taxes set forth in Exhibit A, hereto attached and made part hereof, and said several assessments were made by said county to unknown owners. This is not a concession that the lands were subject to taxation for said years.

Third. That the Dubuque & Sioux City Railroad Company paid to said county the several amounts of money mentioned in said Exhibit A, at the several dates therein set forth, and took from said county receipts for the sums of money so paid in the usual
12 form as for taxes. It is understood that defendant shall have the right to have Exhibit A corrected to conform to the facts, if found in any way erroneous, and for that purpose defendant may read in evidence copies of deeds from the real estate records of Webster county.

Fourth. That said several sums of money were paid to said county without any actual demand or request by said county therefor.

Fifth. That said defendant has never paid said taxes to said county, or any part thereof, and said county has always hitherto refused to refund [to] said railroad company, or to said plaintiff, Goodnow, the money paid as aforesaid.

Sixth. That the lands mentioned in plaintiff's petition are part of the lands purported to be conveyed by the Dubuque & Sioux City Railroad Company to the Iowa Homestead Company by a deed of general warranty given by said company in November, A. D. 1863, and also a part of the lands in controversy in the suit of the Iowa Homestead Company *vs.* The Des Moines Navigation & Railroad Company *et al.*, in 17 Wallace, 153.

Seventh. That the reports of the cases of the Dubuque & Pacific Railroad Company *vs.* Edwin C. Litchfield, in 23 Howard, 66; The Iowa Homestead Company *vs.* The Des Moines Valley Railroad Company, in 17 Wallace, 153; and Wolcott *vs.* The Des Moines Valley Railroad Company, 5 Wallace, 681, as reported therein, shall be received as evidence by the court as far as competent and material to any of the issues herein.

Eighth. That the printed transcript of the record in the Supreme Court of the United States in said case of The Iowa Homestead Company *vs.* The Des Moines Valley Railroad Company, may be received as evidence and considered by the court with like effect as the original might be, so far as material to any of the issues herein, either party having the right to offer in evidence such portions as he may deem relevant and material.

13 Ninth. That the costs of Exhibit A shall be taxed as part of the costs of this suit.

Tenth. That all the lands described in the petition lie within five miles of the Des Moines river, in the alternate odd-numbered sections, above the Raccoon Forks of said river, and were, prior to May 3d,

1858, certified and approved to the State of Iowa under the act of Congress of August 8th, 1846, entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river in said Territory."

Eleventh. That on the 3d day of May, 1858, pursuant to a sale thereof previously made and an act of the General Assemby of Iowa, passed March 22, 1858, entitled "An act disposing of the grant of land made by an act of Congress, granting land to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, and a joint resolution of said General Assembly, adopted on the day and year last aforesaid, entitled 'Joint resolution containing propositions for a settlement with the Des Moines Navigation & Railroad Company,' the State of Iowa, by its deed or patent, granted and conveyed all of said lands to the Des Moines Navigation & Railroad Company, a corporation duly organized, created, and established under the laws of the State of Iowa; and subsequently thereto, and prior to the year 1860, said company executed a deed of conveyance for said lands, described in the petition herein, to the said John Stryker.

Twelfth. That said Samuel G. Wolcott and his grantors, prior to March 2, 1861, claimed title in fee simple to all of said lands, under said act of Congress of August 8, 1846, and the certification, approval, and conveyance aforesaid thereunder, and constantly since March 2, 1861, has claimed title to said lands under the joint resolution of Congress of that date.

Said John Stryker was a *bona fide* purchaser of said lands under the State of Iowa, as contemplated under the joint resolution
14 of Congress approved March 2, 1861. Any documents contained in the records of the case of Dumont *vs.* The Des Moines Valley Railroad Company may be read in evidence the same as though original, duly certified, so far as otherwise competent and relevant.

Thirteenth. That prior to the year A. D. 1861 the Dubuque & Pacific Railroad Company and the Dubuque & Sioux City Railroad Company had completed and were operating, in accordance with the terms of the grant, seventy miles of railroad, commencing at the city of Dubuque, Iowa, and extending west the distance aforesaid; that said railroad was so built and operated in pursuance of and in accordance with the act of Congress, approved May 15, 1856, donating lands to the State of Iowa to aid in the construction of said railroad from Dubuque to the Missouri river, near Sioux City, in Iowa, and of the act of the Legislature of Iowa, approved July 14, 1856, granting said lands to said Dubuque & Pacific Railroad Company, and that the construction of said part of said railroad was duly and properly certified to by the Governor of the State of Iowa before the date aforesaid.

That all the lands falling within the limits of said grant of May 15, 1856, and being east of range thirty-one, in said State of Iowa, and subject to the terms of said grant, including all the lands within five miles of the Des Moines river, in odd-numbered sections, did not amount to more than 226,559 acres. This last amount includes the

fifty thousand acres of land in the odd-numbered sections within five miles of the Des Moines river, which the courts held were no part of the land grant of May 15, 1856.

The defendant shall have the right to show that said taxes were paid by the Iowa Homestead Company, and to object to the competency or materiality of any of the facts herein stated.

THEO. HAWLEY,
Defendant's Att'y.
GEORGE CRANE,
Plaintiff's Att'y.

15 EXHIBIT A, referred to in said agreed facts:

For the year 1861, paid October 31st, 1866	$235.67
For the year 1862, paid December 9th, 1863	93.07
For the year 1863, paid Jan. 20, 1864	66.28

Defendant then read in evidence the following agreement:

Agreed Statement.

For the purposes of the trial of the above-entitled causes it is hereby stipulated and agreed:

First. That the defendant, Sam'l G. Wolcott, is now and has been since the year 1860 a citizen and resident of the State of New York.

Second. That the statute and laws of the State of New York now in force, and which have been in force since 1860, provide that all causes of action based on or arising out of an express or implied promise not in writing are barred after the expiration of six years from the date when said causes of action severally accrued.

Third. That on the hearing and trial of these causes the defendant may offer and read in evidence from the journal of the proceedings of the board of supervisors of Webster county and the tax books of said county such portions thereof as he may deem relevant and material, subject to all objections by plaintiff as to their relevancy, materiality, or competency.

Fourth. That the defendant, through his agent, Benj. Grayson, during the years mentioned in the petition herein, applied yearly to the treasurer of Webster county, Iowa, to pay the taxes levied and assessed upon the lands in said petition described, and found those mentioned and described in plaintiff's Exhibit A, marked paid upon the tax lists for those years respectively.

It is understood that by signing this agreement plaintiff
16 does not waive his right to object to the introduction of the foregoing facts or any part thereof on the ground of irrelevancy, incompetency, or that it is too late, the cause having been tried in the supreme court of Iowa.

GEORGE CRANE,
Attorney for Plaintiff.
THEO. HAWLEY,
Defendant's Attorney.

On the 22d day of May, 1882, the plaintiff filed in the circuit court of Webster county, Iowa, motions supported by affidavits in words and figures following, to wit:

Motion for Change of Venue.

In the Circuit Court of Webster County.

EDWARD K. GOODNOW *vs.* SAM'L G. WOLCOTT.

Now comes Edward K. Goodnow, plaintiff, and moves the court that the venue of this action be changed to the district court of Iowa, in and for Webster county, on the grounds stated in the following affidavits.

M. D. O'CONNELL AND GEO. CRANE,
Attorneys for Plaintiff.

STATE OF IOWA, }
County of Webster, } *ss:*

In the Circuit Court of said County.

EDWARD K. GOODNOW *vs.* SAM'L G. WOLCOTT.

I, Edward K. Goodnow, being previously sworn, depose and say that I am plaintiff in the above-entitled action; that D. D. Miracle, judge of this court, is, to the best of my knowledge and belief,
17 so prejudiced against me that I cannot obtain a fair trial before him, and that the existence of such prejudice was not known to me prior to the last continuance of this cause.

E. K. GOODNOW.

STATE OF NEW YORK, *County of New York:*

I, A. C. Vaughn, a notary public in and for said county and State of New York, do hereby certify that the foregoing affidavit was sworn to before me and subscribed in my presence by Edward K. Goodnow, this 8th day of May, A. D. 1882.

Witness my hand and notarial seal.

[SEAL.]

A. C. VAUGHN,
Notary Public, Kings County.

Certificate Filed in New York County.

STATE OF IOWA, *County of Webster:*

In the Circuit Court of said County.

EDWARD K. GOODNOW *vs.* SAM'L G. WOLCOTT.

John I. Mullany, Edwin B. Farley, and W. P. Dyer, being first duly sworn, depose and say that they are not related to the plaintiff in this action, nearer than the fourth degree, nor do they or any of them stand in the relation of servants, agents, or employes of said plaintiff, nor are they in any other way interested in the result or issue of this action, and they do verily believe that the Hon. D. D.

Miracle, judge of the circuit court of Iowa, in and for said Webster county, is so prejudiced against plaintiff that he cannot obtain a fair trial of said cause before said judge, and that such prejudice was unknown to plaintiff before the last continuance.

JOHN I. MULLANY.
EDWIN B. FARLEY.
W. R. DYER.

18–26 Subscribed and sworn to before me, by John I. Mullany, Edwin B. Farley, and W. R. Dyer, this 19th day of May, 1882.

[SEAL.] W. G. JOERNS,
Notary Public of Iowa in and for Dubuque County.

And said motion coming on to be heard on the 22d day of May, 1882, the court granted the same and made an order transferring said cause to the district court of said county for trial, to all of which the defendants then and there excepted.

27 The plaintiff then read in evidence from the printed transcript of the record in the Supreme Court of the United States in the case of the Iowa Homestead Company against The Des Moines Valley Railroad Company, referred to in said agreed statement of facts, the following portions thereof:

In the District Court of Webster County, Iowa.

IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, EDWIN C. Litchfield, Electus B. Litchfield, Samuel G. Wolcott, and others, and Roswell B. Burrows.

To said defendants above named:

You are hereby notified that there is now on file in the office of the clerk of the district court of Webster county, Iowa, the petition of plaintiff aforesaid, claiming of you that the said Iowa Homestead Company is in possession and has the legal title to certain lands in the alternate sections within five miles of Des Moines river above the Raccoon Fork. That you claim in some way an adverse title thereto, that you be enjoined from prosecuting actions at law or pre-emptions to said lands to quiet the plaintiff's title, and for other relief. You are also notified that unless you appear thereto and defend before noon of the second day of the term of the said district court of Webster county, to be held on the twelfth day of October, 1868, a default will be entered against you and judgment rendered thereon.

IOWA HOMESTEAD COMPANY,
GRANT & SMITH, *Attorneys.*

DES MOINES, IOWA, 10*th October*, 1868.

28 Accepted service for the defendants, The Des Moines Navigation and Railroad Company and Edwin C. Litchfield and Electus B. Litchfield.

J. BROWN,
Agent for Defendant.

At Chambers, city of Davenport, Scott county, Iowa.

Ordered that a temporary writ of injunction do issue, as prayed, on plaintiff's filing bond in penal sum of $500, conditioned as required by law, and the sureties to be approved by the clerk of Webster county, Iowa, district court.

Dated first day of October term, A. D. 1868.

JOHN F. DILLON,
Chief Justice Supreme Court, Iowa.

THE STATE OF IOWA
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell B. Burrows, Edwin C. Litchfield, Wm. McAlpine, Richard B. Chapman, Albert Tracy, Harriet Tracy, Electus B. Litchfield, Edwin Wade, John Stryker, The Des Moines Valley Railroad Company, *et al.*

Whereas the Iowa Homestead Company has filed in our district court for the county of Webster, a petition claiming that the said Homestead Company a corporation created by the laws of Iowa, has the legal title to the lands (which are mentioned and described in plaintiff's petition), and that you or some of you have brought and intend to bring certain actions at law against persons in possession of said land, to divert the title of said Iowa Homestead Company, and that you or some of you are about to prove and claim pre-emptions on some of the lands which are named (in said petition), and has prayed in said bill to grant them title to said lands:

Now, these are to command you and each of you, your agents, attorneys, servants, that you do wholly refrain from prosecuting said actions at law, or either of them, and that you wholly
29 refrain from further applying for or proving up pre-emptions on any of said lands, until the further order of our said district court for the county of Webster. And you will disobey this writ at your peril.

Witness, and in testimony, I, W. Lumpkin, clerk of the district court, have hereunto subscribed my name and affixed the seal of said court, at office in Fort Dodge, this sixth day of October, A. D. 1868.

W. LUMPKIN,
Clerk District Court.

Accepted service of the within writ for the defendants, The Des Moines Navigation and *Homestead* Company, Edwin C. Litchfield and Electus B. Litchfield.

J. BROWN,
Agent of said Defendants.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD CO. *et al.*

In this cause come the defendants, Litchfield and John Stryker, and file their affidavit, bond, and petition for the transfer of this cause in the circuit court of the United States for the district of Iowa under certain acts of Congress of the United States and the court being satisfied that the said affidavit and petition are sufficient under the law, and said bond being approved by the court, it is ordered that this cause be transferred to said circuit court of the United States for the district of Iowa, as to said defendants *in re*, and the clerk of this court is ordered to make the proper papers for said transfer.

30 THE IOWA HOMESTEAD COMPANY

vs.

EDWIN C. LITCHFIELD, ELECTUS B. LITCHFIELD, and JOHN STRYKER, impleaded with Rosswell B. Burrows, The Des Moines Navigation and Railroad Company, and others.

STATE OF IOWA, }
Webster County, } *ss*:

I, John Brown, of Des Moines, in the county of Polk, in said State, being duly sworn, do depose and say that I am the agent of the defendants, Litchfields and Stryker, in the above entitled action, that the same is now pending in the district court of Webster county, Iowa. That the said defendants for whom I am agent as aforesaid are citizens of the State of New York, and that the plaintiff is a citizen of the State of Iowa. That the matter in controversy and dispute between this plaintiff and each and every of the defendants, exceeds the sum of five hundred dollars, exclusive of costs. That I have reason to believe and do believe that from prejudice and local influence said defendants will not be able to obtain justice in the State courts of Iowa, in which this action is pending and untried.

JOHN BROWN.

Subscribed and sworn to by John Brown before me, this 13th day of May, A. D. 1869.

GEORGE B. CORKHILL, *Clerk.*

Know all men by these presents, that we, Edwin C. Litchfield and Electus B. Litchfield and John Stryker, as principals, and John Brown, as surety, are hereby held and firmly bound unto the Iowa Homestead Company in the penal sum of one hundred dollars, lawful money of the United States to the payment of which; well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

31 The condition of this is such, that if the said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker shall enter or cause to be entered in the circuit court of the United States, to be held in and for the district of Iowa, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the district court of the county of Webster and State of Iowa, in which the Iowa Homestead Company is plaintiff, and said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, impleaded, etc., are defendants, and shall do such other appropriate acts, as by the act of Congress, approved July 27, 1866, entitled An act for the removal of causes in certain cases from State courts, are required to be done upon the removal of a suit in the United States courts, then this obligation to be void, otherwise in full force.

EDWIN C. LITCHFIELD.
ELECTUS B. LITCHFIELD.
JOHN STRYKER.
JOHN BROWN.

Petition for Removal.

To the district court of Webster county, Iowa:

The petition of Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, defendants in the above-entitled action, respectfully shows that they are citizens of the State of New York. That this action is now pending in the district court of Webster county, Iowa. That the matter in dispute herein exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioners further show that they have in this court their affidavit as required by the act of Congress, approved March 2, 1867, entitled "An act to amend an act entitled an act for the removal of causes in certain cases from the State court, approved July 27, 1866."

32 And your petitioners file this petition praying for the removal of this suit into the next circuit court of the United States to be held in and for the district of Iowa, and they herewith offer the surety required by the said above-entitled act.

D. O. FINCH AND J. M. ELLWOOD,
Att'ys for Def'ts Litchfield and Stryker.

This affidavit, bond, and petition are filed in place of the original filed in district court of Webster county 13th October, 1868, the same appearing to be lost and not returned.

GRANT,
For Plaintiff.
J. M. ELLWOOD,
For Litchfield and Stryker.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & R. R. CO. *et al.*

OCT. 16, 1868.

And now, on this day, come the defendants, Crouse, McDermott, and Cotter, by their attorney, G. Parsons, and files a motion to dissolve the injunction, which, coming on to be heard, and the court being fully advised in the premises, said motion is sustained as to them. Whereupon this cause is ordered transferred to the circuit court of the United States as to other defendants.

WEBSTER DISTRICT COURT, *Oct.* 13, 1868.

In this cause the defendants, Litchfield and Stryker, come and file their affidavits, bond, and petition for the transfer of this cause to the circuit court of the United States for the district of Iowa, under certain acts of Congress of the United States, and the court being satisfied that said affidavits and petition are sufficient under said law, and said bond being approved by the court, it is ordered that this cause as to the said defendants be transferred to said circuit court of the United States for the district of Iowa, and the clerk is ordered to make the proper papers for said transfer.

Mr. Clerk: Please make the above entry in this cause, and
33 the further entry that as to other defendants the cause is continued by agreement.

GRANT,
For Plaintiff.

The foregoing original notice, acceptance of service, order of Dillon, justice, writ of injunction, and acceptance of service thereof were read in evidence by plaintiff; also the affidavit of James Grant as to the truth of the matters contained in the petition or bill of complaint in said homestead suit, which was in the words following:

STATE OF IOWA, *Scott County:*

I, James Grant, being duly sworn, depose on oath that I am one of the attorneys for the plaintiff; that the facts stated in the foregoing petition are, all of them, of record, except the allegations of the interest and intent of the parties in the suit of Wolcott *vs.* The Des Moines Navigation Company. I have examined the records referred to in the bill and have been informed as to the facts about the Wolcott suit by parties who appeared to know them, and I believe the allegation of the bill to be true.

JAMES GRANT.

Sworn to and subscribed before me, this 1st day of October, 1868.

JOHN F. DILLON,
Judge Supreme Court, Iowa.

STATE OF IOWA:

Webster County District Court.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & R. R. CO. *et al.*

"The petition of the Iowa Homestead Company shows:

"That said company is a corporation duly created by the
34 laws, and a citizen of the State of Iowa, for the purpose of buying and selling lands in said State; that said plaintiffs, by deed of purchase, bearing date the 12th of November, 1863, acquired, by and through the Dubuque & Sioux City Railroad Company, all the right of said company, the Dubuque and Pacific Railroad Company and the State of Iowa, to about fifty thousand acres of land lying on the east side of the Des Moines river, in Webster and Humboldt counties, Iowa, being the odd sections of land within the limits of the Dubuque & Pacific railroad grant of 1856 and the Des Moines river grant of 1856."

It is admitted that the above described fifty thousand acres of land include and embrace all the lands mentioned and described in the petition of the said E. K. Goodnow in the suit now before this court.

"And by said deed and certificates the plaintiff acquired a title to almost twenty thousand acres of land in odd sections within said

grants, in Webster and Hamilton counties, west of said Des Moines river, a list of which is hereto annexed and made part of this bill. Of these lands the fifty thousand acres lying east of the Des Moines river and claimed by the Des Moines Navigation & Railroad Company, a corporation created by the laws of Iowa, and its assigns, and some title or claim to twenty thousand acres of land on the west side of the river, is, or has been, made by the Des Moines Valley Railroad Company, a corporation created by, and a citizen of, the State of Iowa. * * *

"On the 9th of June, 1854, the State made a contract with the Des Moines Navigation & Railroad Company, a corporation created by the laws of Iowa, to improve the navigation of the river and to convey to said corporation all the remaining lands belonging to the State under the act of 1846." * * *

"After the settlement of the State with the Des Moines Navigation Company, in 1858, the said Navigation Company conveyed
35 certain parcels of the land now claimed by plaintiff to the following persons, among others, Samuel G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, W. J. McAlpine, Richard B. Chapman, Albert Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, and John Stryker." * * *

"The said plaintiffs have been in possession of the lands claimed by them, themselves or their vendees, in contract since 1861. They have paid taxes thereon to the State of Iowa since, in all amounting to eighty thousand dollars, and if their title has failed they are entitled to have their taxes refunded since 1861 by the holder of the legal title who has not paid them." * * *

"The plaintiff says he has no adequate remedy for the grievances complained of except in a court of equity. He makes The Des Moines Navigation & Railroad Company, Samuel G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, The Des Moines Valley Railroad Company, Thomas Cotter, Jacob Crouse, John B. McDermott parties defendants to this suit, and prays for a writ of subpœna against them."

"The plaintiff prays that said parties may be enjoined from prosecuting said actions, or any other actions at law in relation to the title or possession of any of said lands, until the final hearing of the bill; that the injunction be made perpetual. That said defendants Cotter, Crouse, and McDermott be enjoined perpetually from prosecuting any pre-emption to any of said lands; that the conflicting acts of the Secretary of the Interior and judicial decisions may be finally interpreted. That the plaintiffs may be quieted in their title and possession to said lands on both sides of the river, or if the plaintiffs' title to said lands is not the better title, and his title to the said lands is the title conveyed by the State, and failed under the right interpretation of the acts of 1846, 1856, and 1862, that his title to an equal number of acres in lieu thereof be decreed and established, that an
36 account be taken of said indemnity lands, and the Des Moines Valley Railroad Company be decreed to make partition

thereof and set apart and convey and relinquish to the plaintiff such lands as the plaintiff may be entitled to under said act of July 12th, 1862."

The State of Iowa being acting trustee to do justice in the premises and to convey to such party as may be established the true beneficiaries under said act. That in the event of a decree that the plaintiffs' present title, or any part of it, has failed, that the said Des Moines Navigation and Railroad Company and its assigns may be decreed to repay to the plaintiff all the taxes which he has paid on said lands and interest thereon. And that said Des Moines Valley Railroad Company be decreed to release to the plaintiffs all claims to the indemnity lands set apart to the plaintiffs, and for such other relief as the nature of the plaintiffs' case may require.

GRANT & SMITH,
Attorneys for Plaintiff.

Comes the plaintiff, October 23d, 1860, and by leave of court and consent of counsel files the following amendment to his bill, to wit:

Circuit Court of the United States, District of Iowa.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

The plaintiff, by leave of court and agreement of counsel, amends his description of the property in dispute by adding, after the first clause in the bill, the following words:

That said lands in dispute and claimed by the Des Moines Navigation and Railroad Company and its assignees are the odd sections in townships 86, 87, and 88, ranges 27, 28, 29, and 30
37 west, which lies south of the second correction line, within five miles of the Des Moines river, and townships 89, 90, 91, and 92, ranges 28 and 29, east of the Des Moines river within five miles of the east branch thereof.

The lands to which the Des Moines Valley Railroad Company make some claim are the odd numbered sections in townships 89 and 90, ranges 28 and 29, which lie west of the Des Moines river and within five miles thereof.

GRANT & SMITH.

The amendment, being made to correct and simplify a description of the lands in controversy, is conceded to be true without formal answer.

Part of the answer of Wm. B. Wells, defendant in said suit:

United States Court, District of Iowa.

THE IOWA HOMESTEAD COMPANY, Complainant,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield,

Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus Litchfield, Edward Wade, John Stryker, and others, Defendants.

The several answer of the defendant, Wm. B. Wells, to the bill of complaint of the Iowa Homestead Company, complainant.

* * * And this defendant further answering denies that the title of the complainant to the lands claimed by these defendants and by the Des Moines Navigation and Railroad Company and its grantees is superior and paramount to that of the said com-
38 pany and its grantees, and he expressly denies that the plaintiff, by reason of the matters in said complainant's bill of complaint contained, as against the said Des Moines Navigation and Railroad Company and its grantees, has any title whatever to the said lands claimed by said company and its several grantees respectively.

And this defendant further answering says that, as to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them since 1861 to the amount of $80,000, this defendant is ignorant and uninformed, save by the said complainant's bill of complaint; but he expressly avers that the possession of the lands by the complainant and its vendees since 1861 is, and has been, unauthorized and wrongful, and that the said complainant should be required to account for the use and rents and profits thereof to the proper owners respectively during the time they have been in such possession; and he also expressly alleges and avers that all taxes whatever paid by said complainant have been paid by complainant voluntarily, with a knowledge of all the facts, and that the complainant is not entitled to have the same, or any part thereof, refunded.

And on this day, to wit, the 2d day of August, 1869, come the defendants, The Des Moines Navigation and Railroad Company, Samuel G. Wolcott, E. C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, and John Stryker, by Ellwood, solicitor, and file in said cause the following answer to complainant's bill of complaint, to wit:

39 United States Circuit Court, District of Iowa. In Equity.

THE IOWA HOMESTEAD COMPANY, Complainant,

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Edwin C. Litchfield, Electus B. Litchfield, William J. McAlpine, Richard B. Chapman, Edward Wade, and John Stryker, Defendants to the bill of complaint of the Iowa Homestead Company, Complainant.

These defendants, The Des Moines Navigation and Railroad Company, Samuel G. Wolcott, Edwin C. Litchfield, Electus B. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Edward Wade, and John Stryker, now and at all times hereafter saving and reserving to them-

selves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or to so much and such parts and portions thereof as these defendants are advised is material for them to make answer unto, answer and say that the foregoing and annexed answer of Wm. B. Wells herein, save as herein otherwise stated and set forth, truly and correctly sets forth all the facts and contains all the averments and allegations relied upon by these defendants, and each and every one of them, as a defense to the said complainant's bill of complaint. That the said answer of said Wells and the admissions and denials and affirmative allegations therein contained are true to the best knowledge and belief of these defendants, and that these defendants adopt the said answer of the said Wells as their answer to the complainant's said bill of complaint, save and except as herein otherwise stated and set forth.

And these defendants, further answering, allege and aver that all the lands in and by the complainant's bill claimed to be in dispute by and between the complainant and these defendants were by the State of Iowa duly granted and conveyed to the said Des Moines Navigation and Railroad Company by the State of Iowa, as in the said answer of the said Wm. B. Wells fully stated and set forth, and that subsequent to such conveyance by the State to said Des Moines Navigation and Railroad Company the said company bargained, sold, granted, and conveyed to these defendants respectively, separate and distinct tracts and parcels of said lands claimed by complainant, as will more fully appear by reference to the deeds or conveyances executed by said company to these defendants respectively, and to which several deeds for greater certainty these defendants pray leave to refer, and that each and every of these defendants is a *bona fide* purchaser under the State of Iowa of the tract or tracts respectively conveyed to him by said company, and that he has full, complete, and indefeasible title thereto.

And these defendants deny that the said complainant is entitled to the relief claimed in his bill of complaint or any part or portion thereof, and aver and insist that by reason of the matters above and in the said answer of Wm. B. Wells, adopted and made a part thereof, contained the title of these defendants to the lands in dispute claimed by them respectively is perfect and absolute.

All which matters and things these defendants are ready to aver, maintain, and prove as this honorable court shall direct, and they pray that their respective titles to the tracts claimed by them respectively may be confirmed and approved and declared valid, and that they be hence dismissed with their costs herein most wrongfully sustained.

FINCH & RIVERS AND J. M. ELLWOOD,
Attorneys for Defendants above named.

And on the 13th day of May, A. D. 1870, there was filed in said cause the following stipulation of parties:

41 United States Circuit Court, District of Iowa.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. WOLCOTT, Wm. B. WELLS, ROSWELL S. BURROWS, EDWIN C. LITCHFIELD, Wm. J. McALPINE, RICHARD B. CHAPMAN, ALBERT H. TRACY, HARRIET TRACY, ELECTUS B. LITCHFIELD, EDWARD WADE, JOHN STRYKER, and others.

It is stipulated and agreed that the joint and several answers of the defendants, Albert H. Tracy, Francis Tracy, and Harriet Tracy, verified by Albert H. Tracy; the several answers of the defendant, Wm B. Wells, sworn to by said Wells, and the joint and several answers of the defendants, Samuel G. Wolcott, Edwin C. Litchfield Wm. J. McAlpine, Richard B. Chapman, Electus B. Litchfield, Edward Wade, John Stryker, and the Des Moines Navigation and Railroad Company, sworn to by Electus B. Litchfield and Nathan J. Higbee be deemed and taken as the answer of the several defendants herein, and that all previous answers of the said defendants, verified by their solicitors and filed herein, be withdrawn from file.

To the several preceding answers the plaintiff filed a formal replication—putting in issue the several averments therein contained.

Stipulations between the Parties.

In the Circuit Court of the United States.

IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES VALLEY RAILROAD COMPANY *et al.*

It is agreed that the only questions submitted on this hearing are:

42 1. In which of the parties is the paramount title to the lands in controversy?

2. If the title shall be adjudged to be in the defendant, The Des Moines Navigation and Railroad Company, is the plaintiff entitled to be reimbursed the taxes which it has paid on the lands?

The amount of taxes paid is admitted to be $2,000. If the court shall find that the plaintiff is entitled to be so reimbursed, the question of the amount to be reimbursed shall be referred to a master, and the defendant shall have the right to show any counter-claims or matters which should be considered as reducing the amount to be reimbursed.

It is admitted that D. W. Kilbourne was a director in the Des Moines Valley Railroad Company from 1862 to 1867. It is admitted

that the Dubuque and Sioux City Railroad was completed to Sioux City July 4th, 1870.

GRANT & SMITH,
Attorneys for Plaintiff.
WITHROW & WRIGHT,
For D. M. N. & R. R. Co.
S. L. STRONG AND
WITHROW & WRIGHT,
For D. M. V. R. R.
C. C. NOURSE,
For R. S. Burrows.

And afterwards, to wit, on the 31st day of May, 1871, the following decree was rendered in said cause by said circuit court:

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

The cause came on to be heard at the May Term, 1871, of
43 said court, Grant & Smith, for the plaintiff, and Ellwood, Nourse & Withrow, for the Des Moines Navigation and Railroad Company and purchasers, and Withrow & Strong, for the Des Moines Valley Railroad Company. And the cause is heard upon the bill and amendments, answers, replications, agreements of counsel, exhibits, and depositions.

And thereupon it was ordered, adjudged, and decreed that the plaintiff's bill as to the lands in townships 86, 87, and 88, ranges 27, 28, 29, and 30, east and west of the Des Moines river and south of the second correction line, and townships 89, 90, 91, and 92, ranges 28 and 29, east of the Des Moines river, and the bill for the relief for indemnity lands in lieu thereof be dismissed.

And the bill for relief as to the lands in townships 89 and 90 north, range 28 and 29 west, on the west side of Des Moines river, be dismissed without prejudice, and that the plaintiffs pay the costs.

The following agreement was filed in said cause by the parties on the 20th day of October, A. D. 1871:

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION & R. R. CO. *et al.*

It is agreed between the counsel for the complainants and defendants who have appeared and answered, that the foregoing case was tried in the circuit court upon the bill, amendments, answers, replications, exhibits, and depositions offered by plaintiff and defendant at and in the foregoing record, which the parties agree to examine and correct when printed.

It is further agreed that the plaintiffs have all the title to the property in dispute which lawfully belonged to the Dubuque and Pacific Railroad Company, or Dubuque and Sioux City Railroad Company, its assignee.

44 It is also agreed that either party should be authorized to read, either in the court below or in the Supreme Court, all acts, resolutions, and memorials, journals or public documents of Congress or the State of Iowa, which relate to the matter in controversy, without offering them formally to the court, and use them in argument by proper reference.

It was also agreed that if either has omitted from their record any public record of the State or United States which relates to the matter in controversy, the same may be read and considered in the appeal court by furnishing the adverse party with notice thereof thirty days before the argument, the object of both parties being to obtain a final adjudication of the questions made in the issues between the parties or all the facts which belong to the same.

And it is further stipulated that the defendants, Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade, and John Stryker, each and every of whom are citizens of New York, and the Des Moines Navigation and Railroad Company, duly appeared in this court and filed their joint and several answers to the complainant's bill, duly verified; that the said answers are not now found with the papers in this cause; that the said answers of said defendants were substantially in all respects like those of the defendants, Wm. B. Wells and Albert Tracy, on file herein and duly verified by them respectively, except such changes, variations, and alterations as were necessary to present the interests held by said defendants respectively in the land in controversy in this action.

And it is further stipulated and agreed that the said answer of defendant, Wm. B. Wells, verified by him, with the necessary changes, alterations, and variations, to show and present the proper and respective interest of defendants, Samuel G. Wolcott, Edwin C. Litchfied, Edward Wade, and John Stryker, and the Des
45 Moines Navigation and Railroad Company, shall be taken, treated, and deemed the answer of said last-named defendants herein.

J. M. ELLWOOD,
For all the Defendants Represented.
WITHROW & WRIGHT,
For all the Defendants they represent, except the Des Moines Valley Railroad Company.
GRANT & SMITH,
For Plaintiff.

In the Supreme Court of the United States.

THE IOWA HOMESTEAD COMPANY
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.*

To prevent unnecessary incumbrance of the record in this cause it is stipulated that the evidence in the court below established the following facts:

That on the 7th day of April, 1863, there was certified to the State

to aid in the construction of the Dubuque and Pacific railroad lands as follows:

	56,573.32 acres.	
	21,061.91 "	
	1,382.32 "	
		78,917.25
And the 13th December, 1864		159.60

That the land certified on the 27th day of December, 1858, embraced none of the lands in dispute in this controversy and no lands lying in odd numbered sections within five miles of the Des Moines river.

That the lists made on the 7th of April, 1863, and the 13th of December, 1864, embraced the lands in dispute, except in-
46 demnity lands, and all were in odd numbered sections within five miles of the Des Moines river. * * *

(Signed) WITHROW & WRIGHT,
For The Des Moines Navigation and Railroad Company and The Des Moines Valley Railroad Company.
GRANT & SMITH,
For Plaintiff.

And on this day, to wit, the 13th day of May, in the May term, A. D. 1870, of said court, in the records of the proceedings thereof in said entitled cause, there appears the following entry, to wit:

THE IOWA HOMESTEAD COMPANY, Complainant,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, SAMUEL G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, and others, Defendants.

This action was commenced in the district court of Webster county, Iowa, at the October term of said district court. The defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, filed their affidavits, bond, and petition, asking the removal of this action from said district court to this court, under the provisions of the act of Congress approved March 2d, 1867, entitled An act to amend an act for the removal of causes in certain cases from the State courts, approved July 27, 1866.

And it appearing to said district court that said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker were non-residents of the State of Iowa and residents of the State of New York, and
47 that their application for the removal of this cause to this court is in all respects conformed to the requirements of said act of Congress, the said district court, at the October term thereof, in the year 1868, made the usual order transferring and removing this cause to this court, as to the defendants Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, and this cause as to said defendants removed to this court for trial.

And it appearing that the defendants, Samuel G. Wolcott, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, are each and every of them now residents of the State of Iowa and district of Iowa, and, under the statute above referred to, are also entitled to a removal of this cause from the State court, and that said defendants, with the express consent and approval of the plaintiff, have appeared and answered the bill herein, and asked to be made parties defendant, and that their rights may be heard and determined in this court and on the trial of this action.

And it further appearing to this court that the defendants so asking to be made parties claim and hold under the same title as the defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, their defence is in all respects identical, with the said plaintiff consenting, it is ordered that said Samuel G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, and each and every of them, be made parties defendants herein; that the answer filed by said persons be taken and deemed their answer to the complainants' bill, and that by their appearance and answer herein the said persons be deemed and treated as defendants herein, and their rights in the premises adjudicated in and by this court in this action.

The defendant then read the following portions of said record

48 *Notice Respecting Certain Lands in the State of Iowa.*

Notice is hereby given that the lands along the Des Moines river, in Iowa, and within the within claimed limits of the Des Moines grant in that State, above the mouth of the Raccoon Fork of said river, which have been reserved from sale heretofore on the account of the claim of the State thereto, will continue reserved, for the time being, from sale or from location by any species of script or warrant, notwithstanding the recent decision of the Supreme Court against the claim.

This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the State, and to make such provision, by confirmation or adjustment, of the claims of such settlers as may appear to be right and proper.

JOS. S. WILSON,
Commissioner of the General Land Office.

General Land Office, May 18th, 1860.

Such notice was at once posted in a conspicuous place in said land offices in Iowa, and so remained posted until the close of the year 1863.

On the 25th May, 1860, Wm. T. Steiger, an agent in behalf of the Dubuque & Pacific Railroad Company, filed in the General Land Office a list of lands laying within the claimed limits of the Des

Moines river grant above the Raccoon Fork, and claimed to select some of them for said railroad company, under the act of 15th May, 1856, granting lands to Iowa for railroad purposes.

The Commissioner of the General Land Office, in June, 1860, acknowledged the receipt of the list, and added:

"The tracts in said list are above the Raccoon Fork, and within the lands that had been selected under the Des Moines river grant, by act of 8th of August, 1846; and in view of the recent decision of the Supreme Court affecting the title to lands under that
49 grant above the Fork, the present lists are presented by you.

As the matter has been placed in train for Congressional intervention, no action can be taken in the matter presented by you until Congress shall have had time to consider and dispose of the subject.

"Respectfully, your obedient servant,

"JOS. S. WILSON,
"*Commissioner.*"

On the 7th July, 1860, the commissioner of the Land Office, in an official letter to the Secretary of the Interior in relation to the same subject, said:

"Without passing upon, or, in fact, considering the question as to the right of the State under the railroad grant to these lands, which, at this date of the grant had been withdrawn from sale or location, the fact that Congress has taken incipient action in the matter, of itself justifies us in not recommending further proceedings by the Department until after the close of the next session of Congress.

"Respectfully, your obedient servant,

"JOS. S. WILSON,
"*Commissioner.*"

On the 6th September, 1860, the Secretary of the Interior addressed the following letter to the Commissioner of the General Land Office:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Sept. 6th*, 1860.

SIR: In the absence of any direct application by the Governor of the State of Iowa, for final action in the certification of certain lands common to the claimed limits of the grant to that State for the improvement of the Des Moines river and the grants for aid in constructing railroads; my opinion is that it will be proper, as you suggest, to delay action until after the close of the next session of Congress.
50 The papers enclosed with your letter of the 7th July last and 3d, instant, are now returned.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

THE COMMISSIONER OF THE GENERAL LAND OFFICE,
WASHINGTON, *June 1st*, 1860.

Hon. JOSEPH S. WILSON,
Commis'r Gen'l Land Office.

SIR: Having been informed that the resolution introduced in the Senate by the Hon. Mr. Grimes, of Iowa, for confirming sales made by the State of certain lands on and near the Des Moines river and for other purposes, S. R. No. 37, has just been referred by the Committee on Public Lands of the Senate to the Secretary of the Interior for his views, and is now before you for report—

I respectfully ask, in behalf of the railroad companies, that the enclosed printed copy of the decision of the Supreme Court referred to in the resolution may be communicated to the committee; also, that the companies may have the benefit of the facts, that the lands in question were by agreement, in adjusting the railroad grants at your office, placed in suspension, to await the decision of the courts, and that since the decision of the Supreme Court was rendered, they have been claimed and selected for the railroads, and particular lists and maps thereof, filed by me as their agent, in the General Land Office.

I am, very respectfully, your obedient servant,
WM. T. STEIGER, *Agent, &c.*

Notice Continuing Reservation of the Lands from Sale, May 18th, 1860.

Notice respecting certain lands in the State of Iowa.

Notice is hereby given that the lands along the Des Moines
51 river, in Iowa, and within the claimed limits of the Des Moines grant in that State, above the mouth of the Raccoon Forks of said river, which have been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved, for the time being, from sale or from location, by any species of scrip or warrants, notwithstanding the recent decision of the Supreme Court against the claim.

This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers, holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper.

JOS. S. WILSON,
Commissioner of the General Land Office.

General Land Office, May 18, 1860.

Steiger, Agent, &c., to Commissioner Wilson, May 25th, 1860.

WASHINGTON, *May 25th*, 1860.

Hon. JOSEPH S. WILSON,
Comm'r General Land Office.

SIR: Referring to the recent decision of the Supreme Court of the United States on the Des Moines river improvement claim, I herewith transmit a list, marked C, of my selections of this date for and

on account of the Dubuque & Pacific railroad and branch, under the act of 15th May, 1856, of the interfering lands in the Fort Dodge district, Iowa, within the six and the fifteen mile limits of said railroad grant heretofore held in suspension in our adjustment.

This list discriminates the lands conditionally approved for the river grant, from those not yet approved in any list, and embraces as follows:

52	Whole quantity 6-mile limits	59,418.22 acres
	15-miles "	73,729.35 "
	Total	133,606.57

Of which the quantity not yet approved, all west of the river, is as follows:

Not approved 6-mile limits	15,456.47
15-miles "	16,214.12
Total	31,664.59

I also enclose a connected diagram, marked D, showing by the pink and yellow shades thereon the lands hereby selected.

Please acknowledge the receipt hereof.

Very respectfully, your ob'd't serv't,

WM. T. STEIGER, *Ag't, &c.*

Commissioner Wilson to Steiger, Ag't, &c., June 12, 1860.

GENERAL LAND OFFICE, *June* 12, 1860.

W. T. STEIGER, Esq., *Washington, D. C.*

SIR: I have to acknowledge the receipt of your letter of the 25th ult., enclosing lists and maps of lands selected and claimed under the railroad grant to Iowa, by act of May 15th, 1856, for the Dubuque and Pacific railroad.

The tracts in said lists are above the Raccoon Fork, and within the lands that have been selected under the Des Moines river grant, by act of 1846, and in view of the recent decision of the Supreme Court, affecting a title to lands under the grant above the said fork, the present lists are handed in by you.

As the matter has been placed in train for Congressional intervention, no action can be taken in the matter presented to
53 you until Congress shall have time to consider and dispose of the subject.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

Commissioner Wilson to Secretary Thompson, July 7th, 1860.

HON. J. THOMPSON, *Sec. of Interior.*

SIR: I have the honor to return herewith the letter dated 26th ultimo, from W. T. Steiger, agent, &c., asking that certain lands selected and claimed under the railroad grant act to Iowa, of May

15th, 1856, may, without further delay, be certified to the State, and, pursuant to reference, respectfully submit that the lands referred to are embraced in certain lists filed in this office, during the past month, in view of the recent decision of the Supreme Court, affecting a title to lands under the Des Moines river grant of 1846, above the Raccoon Fork. The tracts in said lists are above the Raccoon Fork, and within the lands that have been selected under the above-mentioned river grant.

Upon the receipt of these lists, Mr. Steiger was advised that, as the matter had been placed in train for Congressional intervention, no action could be taken by this office until Congress should have had time to consider and dispose of the subject.

Without passing upon or in fact considering the question as to the right of the State under the railroad grant to these lands, which, at the date of that grant, had been withdrawn from sale or location, the fact that Congress had taken incipient action in the matter, of itself justifies us in not recommending further proceedings by the Department until after the close of the next session of Congress.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

54 *Secretary Thompson to Senator Jones, Nov. 3d,* 1860.

Extract from a letter dated—

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Nov. 3d,* 1860.

SIR: I have the honor to acknowledge the receipt of your letter of this date, and have considered the same in connection with the letter of Mr. Steiger, agent of the Dubuque and Sioux City Railroad Company, of the 1st instant, both relating *the* to the certification to the State of Iowa of lists of odd-numbered sections of land within the six and fifteen-mile limits of the railroad "from the city of Dubuque to a point on the Missouri river near to Sioux City."

For your information I herewith enclose copies of my letters of the 6th September last to the Commissioner of the General Land Office, and of the first of October to Mr. Steiger, and in reply to your letter would state that, as respects those tracts within the limits of the railroad grant which have already been certified to the State of Iowa by my predecessor, under the previous grant of 8th of August, 1846, in the absence of a formal and sufficient surrender by the State of all claims under the prior grant I deem it proper to suspend action at present so far as the claims interfere. The subject of these opposing claims is involved with proposed legislation pending in Congress; and the State authorities still assert the equity of the title which has been recognized by my predecessors, though since *b*eclared to be invalid by a decision of the Supreme Court of the United States.

* * * * * *

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

Hon. Geo. W. Jones, of Iowa, present.

55 *Secretary Thompson to Governor Kirkwood, Nov. 3rd,* 1860.

Extract from a letter dated—

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *November 3d,* 1860.

His Excellency S. J. KIRKWOOD,
Governor, &c., Des Moines, Iowa:

* * * * * * * *

Again I would remark that so far as any proposition for congressional aid in behalf — the State was brought to the notice of this department during the last session of Congress, it was confined, as I understood it, to that portion of the claimed lands which have been heretofore certified by my predecessors, and which has not been included in the lists of lands ordered into market. In respect to this class of lands, I had the honor, in a communication of the 11th June last, addressed to Hon. R. W. Johnson, chairman of the Committee Public Lands of the United States Senate, to recommend the report to that body, for adoption by Congress, the form of a joint resolution, as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all the title which the United States still retain in the tracts of land along the Des Moines river, and above the Raccoon Forks thereof, in the State of Iowa, which has been heretofore certified to said State improperly by the Department of the Interior as part of the grant by act of Congress approved August 8th, 1846, be, and the same is hereby, relinquished to the State of Iowa."

You thus perceive that, so far as my predecessors have acted under the grant of August 8th, 1846, I was willing to recommend a confirmation of that action by Congress. I cannot, however, go further.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

56 *Joint Resolution to Quiet Title to Lands in the State of Iowa, approved March 2d,* 1861. (12 *Stat. at Large, p.* 251.)

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all the title which the United States still retain in the tracts of land along the Des Moines river, and above the mouth of the Raccoon Forks thereof, in the State of Iowa, which have been certified to said State improperly by the Department of the Interior as part of the grant by act of Congress, approved August 8th, 1846, and which in now held by *bona fide* purchasers under the State of Iowa, be, and the same is hereby, relinquished to the State of Iowa.

Approved March 2nd, 1861.

Pleas in the circuit court of the United States for the southern district of New York, held at the United States circuit court rooms, in the city of New York, in said district, of the term of April, in the year of our Lord one thousand eight hundred and sixty-five.

Witness the Honorable Samuel Nelson, Justice of the Supreme Court of the United States.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Des Moines Navigation & Railroad Company, being a corporation created by and under the laws of the State of Iowa, and organized and residing in said State of Iowa, were summoned to answer Samuel G. Wolcott, a citizen of said State of New York, of a plea of breach of covenant; and thereupon the said Samuel G. Wolcott, plaintiff, by Jasper W. Gilbert, his attorney, complains of the said The Des Moines Navigation & Railroad Company, defendants, of a plea of breach of covenant, for that whereas, heretofore, to wit, on the eighth day of August,
57 in the year of our Lord one thousand eight hundred and fifty-nine, at Des Moines, in the said State of Iowa, to wit, at the city of New York, in the said southern district of New York, by a certain deed-poll then and there made by the said defendants, which said deed-poll, sealed with the seal of the said defendants, the plaintiff now brings into court here, the date whereof is the day and year aforesaid, it was witnessed that the said defendants, in consideration of the sum of three thousand and forty dollars, to them in hand paid by the said plaintiff, did thereby grant and convey to the said plaintiff the following tract of land in said State of Iowa, to wit, in Webster county: The east half of section seventeen, in township eighty-eight, range twenty-seven, containing three hundred and twenty acres; and the said defendants, in and by the said deed-poll, then and there, in consideration of the moneys aforesaid, did warrant the title of said land against all persons whomsoever, and did thereby covenant to and with the said plaintiff that the said defendants then had, and that the said plaintiff, by reason of the said deed-poll, did and would receive and take, a good and perfect title in fee to the said tract of land, as by the said deed-poll, reference being thereto had, will more fully and at large appear; yet the said plaintiff, in fact, saith that the said defendants then and there had no title whatever to the said tract of land, nor any part thereof, and that the said plaintiff did not then or there or at any time afterwards, by reason of the said deed-poll or otherwise, receive, obtain, or take any title whatsoever to the said tract of land, or any part thereof, but that the said defendants, to fulfill their said warranty of the title to said land, and to cause the said plaintiff to receive, obtain, or take a good and perfect title in fee to the said tract of land, although often requested so to do by the said plaintiff, have hitherto wholly neglected and refused, and still do neglect and refuse, of all of which the said defendants had notice; and so the said plaintiff in fact saith that the said defendants, although often requested, etc., have not kept the said covenants so by them
58 made as aforesaid, but have broken the same, to the damage of said plaintiff of ten thousand dollars; and thereof the said plaintiff brings his suit, etc.

And the said defendants, by W. & C. Tracy and Tallmadge, their

attorneys, come and defend the wrong and injury when, etc.; and as to the supposed breach of covenant above assigned and alleged by the said plaintiff, they, the said defendants, say that the plaintiff ought not to have or maintain his aforesaid action thereof against them, the said defendants, because they say that they, the said defendants, before and at the time of the making of the said indenture in the said plaintiff's declaration above mentioned, were seized in fee of the said tract of land, and did then and there, by the said indenture, convey to the said plaintiff a good and perfect title in fee to the same; and this the said defendants are ready to verify. Wherefore the said defendants pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c. And for a further plea in this behalf the said defendants, by leave of the court here for the purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said defendants, after the making of the said indenture in the said declaration mentioned, and before the commencement of this suit, to wit, on the first day of August, 1862, acquired and took a title and estate in fee in the said tract of land, which said last-mentioned title and estate, by the common law of the State of Iowa, and also by the statute of the State of Iowa, did forthwith enure to and vest in the said plaintiff, as the grantee of the said defendants, by the said indenture; and by means of the premises the said plaintiff, before the commencement of this suit, did receive and take good and perfect title in fee to the said tract of land, of all which the said plaintiff had notice, without this, that the said plaintiff has suffered any damage by means of anything in the said declarations mentioned; and this the said defendants are ready to verify.

59 Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

And the plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them first above pleaded, says that he, the said plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having or maintaining his aforesaid action, because he says that the said defendants, at the said time when, &c., were not seized in fee of the said tract of land, nor did they convey to plaintiff any title thereto in any manner and form as in that plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country, &c.

And the said defendants do the like.

And the plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them secondly above pleaded, says that he, the said plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having or maintaining his aforesaid action thereof, because he says that the said defendants did not, at the said time when, &c., acquire or take any title or estate, nor did such supposed title or estate vest in the said plaintiff, nor did the plaintiff receive or take any title whatever in manner and form as in that

plea alleged; and this the said plaintiff [prays] may be inquired of by the country, &c.

And the said defendants do the like.

Therefore it is ordered that the issues above joined be tried at the next term of the said circuit court, to be held at the court-rooms in said district above mentioned, commencing on the 3d Monday of October next, the same day as given to the parties aforesaid.

Afterwards, to wit, on the 27th day of October, in the term of October, in the year of our Lord one thousand eight hundred and sixty-five, in the said circuit court, at the court-room thereof, in the city of New York, in said southern district of New York, before the Hon. Samuel Nelson, a justice of the Supreme Court of the United States, come to the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury, being summoned, also came, who, to speak the truth in the matter aforesaid in issue, being chosen, tried, and sworn, say upon their oaths that the defense by the said defendants above pleaded is true; and they find and return a general verdict in favor of the defendants aforesaid.

60

"Therefore, it is considered by the court here that the said plaintiff take nothing by his said action, but that he be in mercy, etc., and that the said defendants go thereof without day, etc. And it is further considered that the said defendants recover against the plaintiff the sum of twenty-seven dollars and thirty cents for their costs and charges in and about their defence in this behalf expended, and that the said defendants have execution thereof."

Judgment signed this 31st day of October, A. D. 1865.

R. E. STILLWELL,
Deputy Clerk.

In the Circuit Court of the United States for the Southern District of New York.

CALVIN BURR
ag'st
THE DES MOINES NAVIGATION AND RAILROAD COMPANY.

CITY AND COUNTY OF NEW YORK, *ss:*

Calvin Burr, a citizen of the State of New York, complains of the Des Moines Navigation and Railroad Company, being a corporation created by and under the laws of the State of Iowa, and organized and residing in said State of Iowa, and being in custody, &c., of a plea of breach of covenant, for that whereas, heretofore, to wit, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and fifty eight, to wit, at Des Moines, in said State of Iowa, by a certain deed-poll there and then made by the defendants, which said deed-poll, sealed with the seal of said defendants, the plaintiff now brings into court here, the date whereof is the day and year aforesaid, it was witnessed that the said defendants, in consideration of the sum of seventeen thousand eight hundred and sixty-eight dollars and eighty cents, to them in

61

hand paid by the said plaintiff, did thereby grant and convey to the said plaintiff the following tracts of land in said State of Iowa, to wit: All of section nine, in township eighty-nine, range twenty-eight, and all of section twenty-one, in township eighty-nine, range twenty-eight, containing together twelve hundred and eighty acres; and the said defendants, in and by the said deed-poll, there and then, in consideration aforesaid, did warrant the title of said land against all persons whomsoever, and did thereby covenant to and with the plaintiff that the said defendants then had, and that the said plaintiff, by reason of the said deed-poll, did and would receive and take a good and perfect title in fee to the said tracts of land, and each thereof, as by the said deed-poll, reference being thereto had, will more fully and at large appear; yet the said plaintiff in fact saith that the said defendants then and there had no title whatever to the said tracts of land, or either thereof, nor any part thereof, and that the plaintiffs did not then or there, or at any time afterward, by reason of the said deed-poll, or otherwise, receive, obtain, or take any title whatsoever to the said tracts of land or either thereof, but that the said defendants, to fulfill their said warranty of the title to said lands, and to cause the said plaintiff to receive, obtain, or take a good and perfect title in fee to the said tract of land, although often requested so to do by the said plaintiff, have hitherto wholly neglected, and still do neglect and refuse. Of all which the said defendants had notice, and so the said plaintiff in fact saith that the said defendants, although often requested to, have not kept the said covenants so by them made as aforesaid,
62 but have broken the same, to the damage of the said plaintiff, thirty thousand dollars; and thereof the said plaintiff brings his suit, &c.

J. W. GILBERT,
Attorney for Plaintiff.

And the said defendants, by Tracy & Olmsted, their attorneys, come and defend the wrongs and injury, when, &c.; and as to the supposed breach of covenant above assigned and alleged by said plaintiff, then the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, the said defendants, because they say that they, the said defendants, before and after the time of making of the said indenture in said plaintiff's declaration above mentioned, were seized in fee of the said tracts of land, and did then and there, by the said indenture, convey to the said plaintiff a good and perfect title in fee to the same; and this the said defendants are ready to verify. Wherefore the said defendants pray judgment if the said plaintiff ought to have or maintain his aforesaid action against them, &c.

And, for a further plea in this behalf, the said defendants, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said defendants, after

making the said indenture in the said declaration mentioned, and before the commencement of this suit, to wit, on the first day of August, 1862, acquired and took a title and estate in fee in the said tracts of land, which last-mentioned title and estate, by the common law of the State of Iowa, and also by the statutes of the said State of Iowa, did forthwith enure to and vest in the said plaintiff, as the grantee of the said defendants by the said indenture, and that by means of the premises the said plaintiff, before the commencement of this suit, did receive and take a good and per-
63 fect title in fee to the said tracts of land, of all which the said plaintiff had notice, without this, that the said plaintiff suffered any damage by means of anything in the said declaration mentioned; and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

United States Circuit Court, Southern Dist. of New York.

CALVIN BURR
ag't
THE DES MOINES NAVIGATION & RAILROAD COMPANY.

And the plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them first above pleaded, says that he, said plaintiff, ought not, by reason of anything in that plea alleged, to be bound from maintaining his aforesaid action, because he says that the said defendants, at the said time, when, etc., were not seized in fee of the said tracts of land, nor did they convey to the said plaintiff any title thereto in manner and form as in that plea in that belief alleged; and this the said plaintiff prays may be enquired of by the country, etc. And the said defendants do the like.

And the said plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them secondly above pleaded, says that, in the said plaintiff, or not, by reason of anything in that plea alleged, to be bound from having or maintaining his aforesaid action thereof, because, he says, that the said defendants did not, at the said time, when, &c., acquire or take any title or estate, nor did such supposed title or estate vest in the said plaintiff, nor did the plaintiff receive or take any title whatsoever in manner and form as in that plea alleged; and this the said plaintiff pray- may be enquired of by the country, etc. And the said defendants do the like.

J. W. GILBERT,
Plaintiff's Attorney.

64 Therefore the issues above joined are ordered by the circuit court of the United States for the southern district of New York, to be tried at a stated term of said court, appointed to be held at the city hall, of the city of New York, on the — day of —, in the year of our Lord one thousand eight hundred and sixty-four, and place last above named, before Hon. — Shipman, one of the justices of said court, according to the form of the statute in said case made and provided.

Came as well the above-named plaintiff as the above-named defendant, by their respective attorneys above mentioned; and the jurors of the jury summoned to try the said issue being called also came, who, to speak the truth of the matters aforesaid, being chosen, tried, and sworn, say, upon their oath, that the said defendant is guilty of the several breaches of covenant above laid to its charge, in manner and form as the said defendant hath above in that behalf alleged against the said defendant; and the said jury assess the damages of the said plaintiff, by reason of the premises, over and above his costs and charges by him in above his in this behalf expended to the sum of twenty-four thousand two hundred and fifty-five $\frac{76}{100}$ dollars, and for these costs and charges to six cents.

Therefore, it is considered that the said plaintiff do recover against the said defendant his said damages, costs, and charges by the jurors aforesaid, in form aforesaid assessed, and also thirty-eight and $\frac{35}{100}$ dollars for his costs and charges by the said court now here adjudged of increase to said plaintiff, and with his assent, which said damages, costs, and charges, in the whole, amount to twenty-four thousand two hundred and ninety-four and $\frac{11}{100}$ dollars.

And the said defendants in mercy, etc.

Judgment signed this 21st November, 1864.

R. E. STILLWELL,
Deputy Clerk.

65 The court then delivered to the jury the following charge:

Gentlemen of the jury: You will see that the conclusions to which I have come upon the questions raised by the evidence in this case dispose of all except one, and that relative to the damages only, which I will submit to you. I therefore charge you—

1. That no title to the lands in question passed to the Territory of Iowa by virtue of the act of Congress, August 8th, 1846, these lands lying above the Raccoon Forks of the Des Moines river. This point has been already settled by the Supreme Court of the United States in the case of the Dubuque and Pacific Railroad Company *vs.* Litchfield, 23 of How. Rep., 66.

2. That none of the acts of the executive officers of the United States which have been proven, nor all of them taken together, had any effect to extend the operation of the act of August 8th, 1846, over these lands, nor in any manner to confer a title to them, either at law, or, strictly speaking, in equity upon the territory or State of Iowa, or upon these defendants. This result follows from the decision of the Supreme Court already cited.

3. That these acts of the executive officers of the United States, proven and relied on in this case, did not reserve to the United States these lands for the purpose of aiding in any other objects or internal improvements, or for any other purpose whatever, and therefore they are not drawn within the proviso of the act of May 15th, 1856. Those of them which proceeded upon the idea that these lands were embraced in the grant of August 8th, 1846, were mere errors arising out of a misconstruction of the terms of that grant. They were, no doubt, made in good faith and for the pur-

pose of formally fixing and defining rights supposed to have been already granted by Congress. But as these acts, according
66 to the case, 23d How., 66, exceeded the grant made by Congress they were void. These acts were intended as acts of transfer and not acts of reservation. To now attribute to them the effect of having reserved these lands to the United States—that is, set them apart for the use of the Government itself—would be reserving the natural consequences originally intended to flow from them. Such a construction of these acts, I think, would be arbitrary, and neither warranted by any circumstances presented by the evidence or by the settled rules of law. All these acts, therefore, left the lands in question in the same status in which they have always remained. That status was unchanged, not only in fact, but in contemplation of law. The lands were neither sold, granted, nor reserved to the United States for any purpose, but remained in the great body of the public domain, subject to the control of Congress and to the operation of the laws in force regulating the disposition of the public lands.

4. If these views are correct, then the lands in question were embraced in the body of the act of May 15th, 1856, and the title passed by that grant to the State of Iowa in trust. The State took the lands in trust, and by an express provision of the act they were "to be applied to no other purpose whatever" than that of aiding in the construction of certain railroads therein named. It is unnecessary to say that the defendants' enterprise is not one of those named in the act as those to which the application of the lands granted is expressly restricted. Whether or not a title *in presenti* passed to the State on the passage of this act I do not deem it necessary now to determine; but I think it is quite certain that that act placed these lands in such a position that they were not reached by the resolutions of Congress of March 2d, 1861, and July 12th, 1862, upon which the defendants rely. To conclude otherwise would be to hold that these joint resolutions repeal *pro tanto*, without any express provisions—by implication merely—the public act of May 15th, 1856. A construction by which the repeal of a statute by
67 implication is sought to be established is never favored, especially where private rights are concerned.

5. These views, being legal conclusions drawn from facts conceded in the case or established by uncontradicted evidence, cover the whole controversy, except the question of damages. It is my duty, therefore, to direct you to find a verdict for the plaintiff and assess the damages which he has proven he has suffered from the failure of his title to these lands. The rule by which you will be guided will be the amount of the consideration paid, with interest from the day of payment to the present time at the rate of six per cent. per annum.

The defendants' counsel excepted to that part of the charge concerning the effect of the act of August 8th, 1846, contained in the second proposition or section of said charge, and also excepted to that part of the charge contained in the third proposition or section

thereof, and also excepted to that part of the charge contained in the fourth proposition or section thereof, and also to that part of the charge contained in the fifth proposition or section thereof.

The court thereupon charged and instructed the jury to find a verdict for the plaintiff; to which charge and instructions the defendants' counsel excepted.

The jury found a verdict in favor of the plaintiff, and assessed his damages at $24,254.00.

And because the said several exceptions do not appear by the record of the said trial, the said presiding judge, on the prayer of the defendants, has set to this bill of exceptions his seal, the third day of November, one thousand eight hundred and sixty-four.

WILLIAM D. SHIPMAN. [L. S.]

Filed Nov. 21st, 1864.

Bond for cost.

Docket Entries and Extracts from Minutes Supreme Court of
68 *the United States in Samuel G. Wolcott, Plaintiff in Error, vs. The Des Moines Navigation and Railroad Company.*

Supreme Court of the United States. December Term, 1864.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR. } No. 336.

In error to the circuit court of the United States for the southern district of New York.

Chas. Tracy, P. Smith, for intervenor.

Docket Entries.

1864.
Dec. 10. Record received and filed.

No. 221. December term, 1865. Docket entries continued.

1866.
Feb. 8. Motion of Mr. Allison for leave to intervene filed.
Feb. 8. Affidavit of J. M. McKinley filed.
" 13. Leave granted to the Dubuque & Sioux City R. R. Co. to intervene, &c.
" 21. Brief of P. Smith, for intervenor, filed.

No. 133 of December term, 1869. Docket entries continued.

1866.
Dec. 14. Mr. J. F. Duncombe filed a motion to intervene, &c.
" 17. Leave granted Mr. Duncombe to appear and file printed argument.
" 17. No. 204 to be argued with this case.
1867.
Feb. 8. Submitted with No. 204.
May 13. Reversed with costs and a venire awarded.

Supreme Court of the United States. Dec. Term, 1865.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR.

69 *Extracts from Minutes.*

* * * * * *

On consideration of the motion made and affidavit filed in this cause, on the 8th instant, it is now here ordered by the court that leave be, and the same is hereby, granted counsel of the Dubuque and Sioux City Railroad Company to appear and be heard on the argument when this cause is reached.

13 February, 1866.

No. 133 of December Term, 1866.

* * * * * *

THE DES MOINES NAVIGATION AND R. R. Co., Pl'ff in Error,
vs.
CALVIN BURR.

On consideration of the motion of Mr. Duncombe for leave to intervene, &c., in this case, it is now hereby ordered by this court that leave be, and the same is hereby, granted Mr. Duncombe to intervene in behalf of the Iowa Homestead Company in the argument of this cause, and to file a printed argument.

17 December, 1866.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR.

Ordered by the court that No. 204, Samuel G. Wolcott, pl'ff in error, *vs.* Des Moines Navigation & R. R. Co., be argued by counsel, if desired, with No. 133, when reached in the regular call of the docket.

17 December, 1866.

70 THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error,
vs.
CALVIN BURR. } No. 133.

This cause was submitted to the court on the record and printed argument by Mr. Smith, of counsel for intervenors, and stipulation of counsel filed to be considered with No. 204, submitted on printed arguments at the last term of this court.

8 February, 1867.

Supreme Court of the United States, December Term, 1866.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR. } No. 133.

In error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of the record from the circuit court of the United States, for the southern district of New York, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of said circuit court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said circuit court with directions to award a *venire facias de novo*.

Per Mr. JUSTICE NELSON.

Mr. Justice Miller took no part in the decision of this case.

True copies of docket entries, extract from minutes, and judgments.

[SEAL.] Test: D. W. MIDDLETON, *Clerk Supreme Court U. S.*

71 Supreme Court of the United States. December Term, 1866.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR. } No. 221.

In error to the circuit court of the United States for the southern district of New York.

The Dubuque & Sioux City R. R. Company, a corporation, etc., by Wm. B. Allison, its attorney, now comes and moves the court for leave to intervene in the above-entitled cause, and also for leave to file an argument in same for reasons set forth in affidavit filed herewith, and made a part hereof.

DUBUQUE AND SIOUX CITY RAILROAD COMPANY,
By WM. B. ALLISON, *Its Attorney.*

True copy.

[L. S.] Test: D. W. MIDDLETON, *Clerk Supreme Court U. S.*

Supreme Court of the United States. December Term, 1865.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR. } No. 221.

In error to the circuit court of the United States for the southern district of New York.

I, James McKinley, on oath, say that I am an attorney and counsellor-at-law, and am assistant attorney of the Dubuque & Sioux City Railroad Company; that within the past few days, and not before, I have had an opportunity to examine the record in the case above named; that the said railroad company are materially interested in obtaining a correct decision of the principal point raised in said cause, and that I verily believe a decision of the point
72 against the above-named defendant in error would prejudice the interest of said Dubuque and Sioux City Railroad Company, although not a party to the record in the above-named case. The decision made by the court below (Hon. Wm. D. Shipman) is the point on which rests the title to above seventy-seven thousand acres of land granted by Congress to aid in the construction of said Dubuque and Sioux City railroad. Further, that I have reason to fear that said Burr is not a *bona fide* litigant, but, on the contrary, is desirous of obtaining a decision against himself, with a view to prejudicing the title of the Dubuque and Sioux City Railroad Company, and their grantees.

Signature to the foregoing affidavit.

(Signed) JAMES M. McKINLEY.

Subscribed and sworn to before me, the clerk of the district court of Dubuque county, Iowa, this 1st day of February, 1866.

Witness my hand and official seal.

[SEAL.] (Signed) M. LEPPER, *Clerk.*

True copy.

[SEAL.] Test: D. W. MIDDLETON, *Clerk Sup. Court U. S.*

(Endorsed as follows:) The Des Moines Navigation & Railroad Company, plaintiff in error, *vs.* Calvin Burr. Affidavit of James M. McKinley. Filed Feb., 1866. George B. Corkhill, clerk.

Motion on behalf of the Iowa Homestead Company and their Grantees to Intervene for the purpose of Argument.

In the Supreme Court of the United States. Dec. Term, 1866.

THE DES MOINES NAVIGATION & RAILROAD COMPANY, Plaintiff in Error, *vs.* CALVIN BURR, Defendant in Error. } No. 133. Land.

Now, to wit, December 14, 1866, comes the Iowa Homestead
73 Company, and their grantees, of the State of Iowa, and by their attorney, John F. Duncombe, moves the Court to permit

said parties to intervene in this cause for the purpose of argument on the part of defendant in error, and for the cause state—

1. That said company and their grantees are directly interested in the decision of this cause, in this, to wit: Said company and their grantees claim to be owners in fee-simple of the land named in the pleadings, and over fifty thousand acres of other lands, the title to which is involved in the decisions of the legal questions involved in this suit.

(Signed) J F. DUNCOMBE,
Attorney for Intervenor.

True copy.
[SEAL.] Test: D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed as follows: Supreme Court U. S., December term, 1866. Des Moines Navigation and Railroad Company, plaintiffs in error *vs.* Calvin Burr. Motion on part of Iowa Homestead Company to intervene for argument. Filed 14th day of December, 1866. Granted J. F. Duncombe for intervenors.

C.—Docket Entries and Extracts from Minutes Supreme Court United States, in the Des Moines Navigation and Railroad Company, Plaintiff in Error, vs. *Calvin Burr.*

Supreme Court of the United States. December Term, 1865.

J. W. Gilbert. P. Smith, (for intervenor.) Chas. Tracy. Litchfield.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

In error to the circuit court of the United States for the southern district of New York.

74 *Docket Entries.*

1865.
Nov. 27. Record received and filed.
Dec. 21. Stipulation to submit filed.
" Brief of J. W. Gilbert, for the plaintiff in error, filed.
" Brief of Litchfield, for the defendant in error, filed.
1866.
Jan. 2. Submitted under 20th rule.
Feb. 8. Motion of Mr. Allison for leave to intervene, and also for leave to file printed argument.
" Affidavit of J. M. McKinley filed.
Feb. 13. Leave granted intervenor to file argument before 1st of March.
" 21. Brief of P. Smith, for intervenor, filed.
" 26. On motion of Mr. Cook, leave granted him to file argument before 1st March.

Mar. 12. Ordered to be continued to the next term, with leave to any of the parties to file additional arguments.
" 23. Brief of Mr. B. C. Cook, for intervenor, filed.

No. 204 of December term, 1866. Docket entries continued.

1866.
Dec. 4. Reply brief of Litchfield filed.
" 17. Ordered that counsel have leave to argue this case with No. 133, if desired.
1867.
May 13. Adjudged to be affirmed with costs.

Supreme Court of the United States. No. 303. December Term, 1865.

Extracts from Minutes.

* * * * *

75 SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

This cause was submitted to the consideration of the Court on the record and printed arguments by Mr. Gilbert, of counsel for the plaintiff in error, and by Mr. Litchfield, for the defendant in error, under the 20th rule.

2d January, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

On consideration of the motion made and affidavit filed in this cause on the 8th instant, it is now here ordered by the Court that leave be, and the same is hereby, granted counsel of the Dubuque and Sioux City Railroad Company to file and submit printed arguments in this cause at any time before the 1st day of March next.

13th February, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

On motion of Mr. B. C. Cook, leave granted him to file a printed argument in this cause by the first Monday of March next.

26th February, 1866.

76 SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 204.

December Term, 1866.

Ordered by the Court that this cause be argued by counsel, if desired, with No. 133, when reached in the regular call of the docket.

Supreme Court of the United States. December Term, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 204.

In error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

13th May, 1867.

Per Mr. JUSTICE NELSON.

Mr. Justice Miller took no part in the decision of this case.

True copies of docket entries, extracts from minutes, and judgment.

[SEAL.] Test: D. W. MIDDLETON,
Clerk Supreme Court U. S.

77 Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

The counsel for the plaintiff and the counsel for the defendant hereby agree to submit, and do submit, this case upon printed arguments.

Dated December 18th, 1865.

(Signed) J. W. GILBERT,
Of Counsel for Plaintiff.

(Signed) EDWIN C. LITCHFIELD,
Of Counsel for Defendant.

True copy.

[SEAL.] Test: D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed as follows: Stipulation to submit. Filed December 21st, 1865.

Supreme Court of the United States. December Term, 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error.
vs.
DES MOINES NAVIGATION AND RAILROAD COMPANY. } No. 303.

In error to the circuit court of the United States for the southern district of New York.

The Dubuque and Sioux City Railroad Company, a corporation,

and by Wm. B. Allison, its attorney, now comes and moves the Court for leave to intervene in the above entitled cause, as a party
78 thereto, and also for leave to file an argument in same for reasons set forth in affidavit filed herewith and made a part hereof.

DUBUQUE AND SIOUX CITY RAILROAD COMPANY,
(Signed) By WM. B. ALLISON, *Its Attorney.*
True copy.
[SEAL.] Test: D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed as follows: Samuel G. Wolcott, plaintiff in error, No. 303, *vs.* Des Moines Navigation and Railroad Company. Motion for leave to intervene on behalf of Dubuque and Sioux City Railroad Company. Filed 8th February, 1866. Wm. B. Allison.

Supreme Court of the United States. December Term 1865.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
DES MOINES NAVIGATION & RAILROAD COMPANY.

In error to the circuit court of the United States for the southern district of New York.

I, James M. McKinley, on oath say that I am an attorney and counsellor-at-law, and am assistant attorney for the Dubuque & Sioux City Railroad Company; that within the past few days, and not before, I have had an opportunity to examine the record in the above-named case; that, to my mind, the said record shows that the attorneys of said Wolcott either did not fully understand their case or the nature of the party opposed to them, or had been instructed not to litigate the case in good faith; that the question involved in said case is one on which depends the title which the Dubuque & Sioux City Railroad Company acquired to about seventy-seven thousand acres of land, to aid in the construction of said road;
79 that a final decision of the above-named case against the plaintiff in error would tend to greatly prejudice the said Dubuque & Sioux City Railroad Company, although they are not a party to the said case; that I have reason to fear the decision of the court below (near bottom of page 61 of the record) was obained on substantially an *ex-parte* presentation of the case, and is greatly prejudicial to the interest of the Dubuque & Sioux City Railroad Company, and is contrary to what would have been the decision on a proper presentation and argument of the case. And, as aforesaid, that an affirmance of the judgment of the court below would prejudice the title acquired by said Dubuque and Sioux City Railroad Company to said seventy-seven thousand acres of land and the title to their grantees.

(Signed) JAMES M. McKINLEY.

Subscribed and sworn to, by James M. McKinley, before me, clerk of the district court of Dubuque, Iowa, February 1, 1866.

Witness my hand and official seal.

[SEAL.] (Signed) M. LEPPER, *Clerk.*

True copy.

[SEAL.] Test: D. W. MIDDLETON,
Clerk Sup. Court U. S.

Endorsed as follows: No. 303. Samuel G. Wolcott, plaintiff in error, *vs.* DesMoines Navigation & Railroad Company. Affidavit of James M. McKinley. Filed 8th February, 1866.

CI.—The Argument of Platt Smith, in Behalf of the Dubuque & Sioux City Railroad Company, in Walcott vs. *The Des Moines Navigation & Railroad Company.*

Supreme Court of the United States. December Term, 1866.

SAMUEL G. WOLCOTT, Plaintiff in Error,
vs.
DES MOINES NAVIGATION & R. R. Co., Defendants in Error.

80 *Argument of Platt Smith, who Intervenes in Behalf of The Dubuque & Sioux City Railroad Company.*

Both of these cases come up from the circuit court of the United States from the southern district of New York. They are both upon the same identical issues, and substantially upon the same state of facts. They are both suits brought against the Des Moines Navigation & Railroad Company to recover damages for alleged failure of title to certain lands in Iowa conveyed by the defendants below to the plaintiffs below by warranty deed. The plaintiffs below are citizens of the State of New York, and the defendant below is a citizen of Iowa.

The lands in dispute lie within five miles of the Des Moines river, and above the mouth of the Raccoon Fork, and in the alternate odd-numbered sections; and they also lie within the six and fifteen-mile limits of the Dubuque & Sioux City Railroad Company, and are included in the act of Congress, granting lands to Iowa, passed May 15th, 1856. The Des Moines Navigation and Railroad Company claim title to these lands under an act of Congress, passed August 8th, 1856, granting lands to Iowa to aid in the improvement of the navigation of the Des Moines river, and under grants and deeds from the State of Iowa, to said company, and also under a joint resolution of Congress, passed March 2d, 1861, and under an act of Congress, passed July 12th, 1862.

The Dubuque and Sioux City Railroad Company claim title to the same lands under an act of Congress, passed May 15th, 1856, granting lands to Iowa to aid in the construction of certain railroads and grants from the State of Iowa to the Dubuque and Pacific Railroad Company, and conveyances from said company to the Dubuque and Sioux City Railroad Company.

Three questions are raised by the records in these causes:

First. Did the act of Congress passed August 8th, 1846, grant
81 the lands in dispute to the State (then Territory) of Iowa, for the purposes specified in the act?

Second. Did the act of Congress of May 15, 1856, grant the lands in dispute to the State of Iowa for the purpose specified in said act, and did the act vest the title to said lands in dispute in the State of Iowa; or were the lands in dispute reserved to the United States so that said act of May 15th, 1856, did not operate to vest them in the State of Iowa?

Third. Did the joint resolution of Congress, passed March 2d, 1861, or the act of July 12th, 1862, pass the title to the lands in dispute to the State of Iowa, and through said State to the Des Moines Navigation and Railroad Company?

The first question was brought directly before this court in the case of the Dubuque and Pacific Railroad Company *vs.* Litchfield, and is reported in 23 Howard, 66.

The court in an elaborate opinion held that the act of Aug. 6th, 1846, did not grant to the State of Iowa any lands above the mouth of Raccoon Fork, and that the Des Moines Navigation and Railroad Company, under whom Litchfield claimed title, had no title to the lands in dispute. That decision must be a finality as far as the construction of that act is concerned. Yet the said Des Moines Navigation and Railroad Company have been making continued attempts to overturn that decision. The defendant, Litchfield, was the president of that company about the time of that decision. (See record, page 5, in the Samuel G. Wolcott case now on hearing.) The judgment entered in the circuit court of Iowa upon the mandate of this court was set aside, and it required the peremptory mandamus of this court to have the judgment stand as the judgment of said circuit court. (Dubuque and Pacific Railroad Company, *ex parte*, 1 Wallace, 69.) A suit was then brought in circuit court of Iowa by Calvin Burr against said Des Moines Navigation and Railroad Company, involving the title to a portion of the same lands as in the present suit, and the case submitted upon an agreed state-
82 ment of the evidence. This case is recorded in 1st Wallace, 99. The Dubuque and Sioux City Railroad Company intervened in that case in this court, and the case was dismissed.

It is clearly for the interest of the plaintiff below in these cases to have the defendant obtain judgment on the question of title, for then they would hold their lands under their deeds. It is also to the interest of the defendants below to succeed, for if it can now succeed in procuring from this court an opinion that the title to the land in dispute is valid, it will give it some one hundred thousand acres of land now held by the Dubuque and Sioux City Railroad Company.

This very readily accounts for the reason that the defendant in the court below should voluntarily go to the State of New York and enter to an appearance to suits there, where it might be out of the way of the interference of the Dubuque and Sioux City Railroad Company.

The records in these cases show that there is no real contest between these parties to the suit, but that the real litigant against both parties is the Dubuque & Sioux City Railroad Company. The other railroad companies interested in the lands granted in the act of May, 1856, which cross the Des Moines above the Raccoon Fork, are also interested in the questions involved.

The second question can only be answered in the affirmative. The act itself vested the title to the lands therein described in the State of Iowa. Its language is: "That there be, and is hereby, granted to the State of Iowa for the purpose," etc. This is a present grant. The particular lands granted are made certain by the location of the line of the road, and all the estate of the United States passed by the act itself to the State of Iowa. We refer to a few of the authorities on this point, as it seems so well settled as to be beyond dispute. (United States *vs.* Brocks, 10 Howard, 442; Lassieur *vs.* Price, 12 Howard, 59; Dubuque & Pacific Railroad Company *vs.* Litchfield, 23 Howard, 66.)

83 In this last case the court, speaking of the act of August 8th, 1846, where the granting clause is the same language as the act of May 15th, 1856, used the following language: "The act of Congress was a direct grant to Iowa in fee of the undivided moiety of the whole track on each side of the river from the Raccoon Fork to the Missouri line. Congress had the undoubted power to make the grant and vest the fee." The record in the case of S. G. Walcott, p. 46, shows that said road was located on the 27th day of Sept., 1856, and the lands in dispute lie within the six-mile limit of the line of said road and the alternate odd-numbered sections. On the 14th day of July, 1856, the General Assembly of Iowa passed an act granting all the lands included in the act of May 15th, 1856, to aid in the construction of the railroad from Dubuque to a point on the Missouri river, at or near Sioux City, to the Dubuque & Pacific Railroad Company. The granting part is in the following language: "Are hereby disposed of, granted, and conferred to and upon the Dubuque & Pacific Railroad Company," etc. This is a grant *in presenti*, and vested the title to the lands in said company. Upon the location of the line of said road the title in the particular lands vested, and the United States had no remaining interest in them. On the 9th day of July, 1857, said company conveyed the lands in dispute by deed of trust to certain parties to secure bonds to be issued for the construction of the road, and on the — day of November, 1863, said Dubuque & Sioux City R. R. Company (which had become vested with the right and title of the Dubuque & Pacific Railroad Company in said lands) conveyed the same to George J. Forrest and others.

It is now claimed that the proviso to the first section of the act of May 15th, 1856, excepted the lands claimed by the Des Moines Navigation & Railroad Company from the operation of this grant. That proviso is as follows: "And provided further, That any and all lands heretofore reserved to the United States by an act

84 of Congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improve-

ments, or for any other purpose whatever, be, and the same is hereby, reserved from the operation of this act," etc. It is not claimed that any act of Congress had reserved the lands in dispute to the United States, unless the decision in the case of the Dubuque & Pacific Railroad Company *vs.* Litchfield, 23 Howard, is erroneous, and is to be overruled. But it is claimed that these lands were reserved to the United States by certain executive officers of the Government, and that the joint resolution of March 2nd, 1861, and the act of Congress of July 12th, 1862, vested these lands in the State of Iowa, and through it in said Des Moines Navigation & Railroad Company. The above proviso requires that the reservation be to some legal purpose and by competent authority. The only purpose claimed for such reservation was to aid in the improvement of the Des Moines river. Aut this court held in the above case, in 23 Howard, that the lands in dispute were not reserved, and that no right in or to them passed by the act of Aug. 8, 1846. No reservation has been made by competent authority. The evidence set out in the record shows that prior to the act of May 15th, 1856, the proper executive officers of the Land Department of the United States had constructed the act of August 8th, 1846, as a grant extending above the mouth of the Raccoon Fork, and as including the lands in dispute; that the lands in dispute had been selected as within said grant, and that such selections had been approved by the proper executive officers of the United States. If these officers had the authority to make a reservation within the aforesaid proviso, and did make such reservation, then the Dubuque and Sioux City Railroad Company has never had any title to the said lands.

The absolute power and the right of disposition of the public lands of the United States is in Congress; no such right exists in any of the officers of the Government, unless specially conferred
85 for some particular purpose by act of Congress. The only authority conferred by act of Congress is the act of Aug. 8th, 1864, and this court has held that no right of reservation was conferred upon such officers by that act. In the case of 23 Howard, above quoted, the court says: "No authority was conferred upon the executive officers administering the public lands to do more than make partitions between the tenants in common, Iowa and the Unied States, in the manner prescribed by Congress. The premises in dispute lie sixty miles beyond the limits of the trust granted. It was therefore impossible to make partition under this grant, of lands lying outside of its boundaries, and all attempts to do so were merely nugatory." These officers never claimed or professed to reserve these lands to the United States by any right in themselves to do so, but only for the purpose of carrying into effect the act of August 8th, 1846. These officers have power to offer for sale, and to suspend from sale, the public lands of the United State, as prescribed by law, but no authority is conferred upon them to reserve the public lands for any particular uses. On the 1st of June, 1849, the officers of the land office at Iowa City were directed to withhold from sale the lands in dispute. (See record in the Wolcott case, page 12.) These executive officers withheld these lands from sale, not as a reserva-

tion, but temporarily, till the construction of the act could be judicially decided. (See same record, pages 14 and 15, 26 and 37.) On the 10th day of May, 1856, just before the act of May 15th, 1856, was passed, all the land offices in Iowa were directed to suspend from sale all the lands in the several land districts. If a simple withholding of lands from sale or a suspension of lands from sale by the executive officers is a reservation to the use of the United States for a particular purpose, then the State of Iowa acquired no title to any lands in Iowa, or it acquired the title to all the lands in said land office districts, for all the lands were reserved from sale. We therefore insist that no reservation of the lands in dispute had been made by competent authority, and that the title to the lands vested in
86 the State, and that no act of the executive officers, or even of Congress, could divest the State of Iowa of such title after the exceptance of the grant by the State.

Third. We further claim that under the last question no title to the land in dispute passed to the State of Iowa under the joint resolution of 1861, or the act of Congress of July 12, 1862, for the reason that the United States had no title to grant.

It had already divested itself of the title by the act of May 15th, 1856. No title could pass from the State of Iowa under the act of July, 1862, for the reason that a grant by a State is not a warrantee, and a subsequently-acquired title does not inure to a grantee from a sovereign power. "Grants made by a legislature are not warrantees, and the rule universally applied in determining their effects is that if the thing granted was not in the grantor at the time of the grant, no estate passed to the grantee." (Brice *vs.* Railroad Company, 1 Black, 374.)

All the questions involved in these cases seem to have been fully settled by the prior adjudication of this court, and we trust that the decision in these cases will end litigation in regard to the title to these lands.

PLATT SMITH,
For Intervenor.

Defendant then read from the deposition of John B. Thompson, filed Nov. 17, 1881, as follows:

I have sustained no official or business relation with the Dubuque & Sioux City Railroad Company, except that I have been a stockholder. I was the secretary and treasurer of the Iowa Homestead Company during its existence, from 1864 to June, 1873.

I don't know anything about Mason Thompson's connection with the Dubuque & Sioux City Railroad Company. I know there is such a man as Mason Thompson. I do not know in respect to his connection with the railroad company referred to in the question.
87 The Homestead Company had its regular board meetings as long as I was connected with it—up to June, 1873. I know of no meetings independent of the board meetings after 1873.

Soon after Jesup became president of the Dubuque & Sioux City Railroad Company the railroad company became owner of five-ninths of the stock of the Homestead Company, and after such

change of ownership of the stock there was a new board of directors made of the Homestead Company. Morris K. Jesup, D. Willis James, J. Pierpont Morgan, and J. A. Roosevelt, George J. Forest, Edward Stimpson, and Isaac H. Knox were directors in the companies.

The railroad company owned a majority of the stock of the Homestead Company since the year 1866. I cannot say exactly what date. It was soon after the time that Morris K. Jesup became president of the railroad company; it might have been within two months or within a year after that date.

By owning a majority of the stock they controlled the Homestead Company, and they worked harmoniously with our board.

I know that after Jesup became president of the railroad company all stock of the Homestead Company held by the directors of the railroad company was transferred to the railroad company, amounting to five-ninths of the whole stock. I think it was within a year afterwards, but am not positive. In June, 1873, I sold the railroad company my stock, 560 shares, and took the Dubuque & Sioux City Railroad Company's notes, payable in one, two, three, and four years, and as secretary of the company I can say they purchased at the same time the balance of the stock that was held by other stockholders other than the railroad company on the same terms. As to how much of the stock was owned by the railroad company on the 1st of Oct., 1868, I cannot answer, for the reason that I cannot fix the time when Jesup became president, and by whom the stock has been held since June, 1873; I cannot answer except as above.

88 Soon after Jesup became president there was transferred to the railroad company five-ninths of the entire stock of the Homestead Company, and in June, 1873, as before stated, the railroad company purchased from me and other owners the balance of the stock, making the entire stock of the Homestead Company. I think it was shortly after Jesup became president.

Q. State whether or not there was an agreement between said railroad company and said Homestead Company that, in case of failure of the title to the Webster county lands purchased by the latter of the former, that the railroad company would pay back to the Homestead Company the original cost, with ten per cent. interest thereon; and if so, whether or not any record or memoranda of such agreement was or should have been recorded in the books of both or either of said companies; and if so, in what book or books.

A. There was an agreement to that effect amongst the Iowa Homestead Company's papers. I don't think it was recorded in any book at all.

Q. Is it or is it not true that said railroad company paid the cost and expenses of the litigation in the case of the Iowa Homestead Company against the Des Moines Navigation & Railroad Company, commenced in the district court of Webster county, Iowa, in October, 1868, and taken by appeal to the Supreme Court of the United States, to settle the question of title as to said Webster county lands? State fully all you know with respect to the payment of said costs and expense; whether paid in full by said railroad company, or

jointly by said railroad company and said Homestead company, and if jointly, in what proportion the same were paid by them; and state further whether or not the matter of the payment of said costs and expenses, or provision therefor, was considered or discussed at any meeting of the board of directors of either of said companies at which you were present; and if so, state whether or not both of said companies were represented at such meeting, and if not both, whether or not said railroad company was represented at such meeting.

89 A. I cannot answer whether they paid them or not. They agreed to defend the title. The Iowa Homestead Company never paid a dollar of the expenses. It was never discussed at the Iowa Homestead Company's meetings, and I know nothing about what was done in the railroad company's meetings. I have already stated that the railroad company owned a majority of the stock of the Homestead Company, and we were working harmoniously.

From W. J. Barnes' deposition as follows:

I was land agent for the Iowa Homestead Company from its organization up to some time in 1873. I have had no official relation at any time with the Dubuque & Sioux City Railroad Company.

Q. State whether or not you had, at the time of and previously to the commencement of the suit in the district court of Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation Company and others, for the purpose of trying the title to certain land lying in Webster county, Iowa, claimed by said companies respectively, and in which said Homestead Company sought as alternative relief the recovery of certain taxes paid by said Homestead Company, knowledge of the fact that said suit was and was to be commenced.

A. I had nothing to do with the suit mentioned, although I think it was mentioned to me that such suit would be brought. I neither directed nor participated in the direction of said suit. I don't recollect now exactly who were the officers of the Iowa Homestead Company at the time, but believe they were Morris K. Jesup, president, and John B. Dumont, secretary and treasurer. As to the directors, I have forgotten who they were. As to the officers of the railroad company, cannot say.

I don't think the Iowa Homestead Company paid taxes for 1861,-'2, and '3. I think I paid all their taxes, and my accounts don't show that I paid such taxes for them.

90 From the deposition of George Crane as follows:

Int. 14. Do you know whether or not the books of the D. & S. C. R. R. Co. contain any evidence now with respect to payment of taxes on the lands in controversy in this suit?

Ans. I think they do for a certain year The only year I looked for was a payment in 1866.

I have been the attorney of the plaintiff in this case since 1875 or 1876; possibly since 1874.

My correspondence was not with him, Goodnow, with respect to my employment in the first instance. I think it was with Dumont.

Int. 30. State whether or not you, either by correspondence or orally, communicated with Dumont on the subject before the date of the assignment from the Homestead Company to plaintiff Goodnow of the cause of action in this suit.

Ans. It is possible I did. I do not know how or when. I cannot recollect when the subject was first talked of without refreshing my memory. Dumont acted for my client; may possibly have had a conversation with him before the assignment was made. It may have been before my present client, Goodnow, so far as I know, had any interest at all in the subject-matter of this present litigation. I presume it is true that it was before the assignment to him. What interest, if any, he had before that I don't know.

Int. 63. State whether or not your conversation with him, Dumont, related to both assigaments, and whether or not in that communication, whatever its character was, he represented both companies.

A. I think we talked about the taxes for all the years. I cannot say that he represented either company, as a matter of fact, only we talked over the subject-matter of the recovery of those taxes; and if he was acting for the company—that is, representing the company—I did not know it.

91 From George J. Forest's deposition as follows:

I have been a stockholder in the Dubuque and Sioux City Railroad Company for many years; I have no interest in its property to-day; I was not a director; I or my firm were stock-holders in the Homestead Company, and I have been told that I was a director and an officer; I have no distinct recolletion of my official capacity in the company.

Q. State whether or not you had, at the time and previously to the commencement of the suit in the district court of Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation and Railroad Company and others, for the purpose of trying the title to certain lands lying in Webster county, Iowa, claimed by said companies, respectively, and in which said Homestead Company sought as alternative relief the recovery of certain taxes paid by the said Homestead Company, knowledge of the fact that said suit was or was to be commenced.

A. I have no recollection of any such suit.

Q. State whether or not if you were present when the assignment by either said Homestead Company or said railroad company to Goodnow was made, and, if so, whether said Goodnow was present, and when were said assignment, or either of them, made.

A. I was not present; I do not know whether Goodnow was present or not.

Q. State whether or not you arranged with said Goodnow for the making to him of either of said assignments, and, if so, state whether the same was done orally or by correspondence, and what interest, if any, said Goodnow has in the claim so assigned to him or either of them.

A. I did not.

92 Q. State by what authority the assignment of the cause of action herein to the plaintiff, Goodnow, was made, whether or not it was authorized at and by any meeting of the stockholders, directors, or of any committee of the assignor, and, if so, by which and when, and where was such meeting held and who composed the same.

A. I know nothing about it.

From Mason Thompson's deposition as follows:

I am a director of the Dubuque and Sioux City Railroad Company; I have been connected with such direction four or five years. I am also a director of the Iowa Homestead Company, and have been so during the same period. I acted as president *pro tem.* of that company for a short term during the absence of the president. The board of directors of the Iowa Homestead Company have not held any separate meetings as such, and the directors of both companies are the same persons. I understand that the railroad company owns a majority of the stock of the Homestead Company and has controlled its affairs ever since my connection with the company; and as the railroad company owns the lands, any discussion in regard to them or any matters in reference to the Homestead Company have been had at the meetings of directors of the Dubuque and Sioux City Railroad Company.

Q. State whether or not you had, at the time of and previously to the commencement of the suit in the district court of Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation & R. R. Co. and others, for the purpose of trying the title to certain lands lying in Webster Co., Iowa, claimed by both companies, respectively, and in which said Homestead Company sought as alternative relief the recovery of certain taxes paid by said Homestead Company, knowledge of the fact that said suit was or was to be commenced.

A. I do not know anything about any of these matters of eight years ago.

93 Q. State where the plaintiff, Edward K. Goodnow, resides and what official or other business relation, if any, he sustains to the said Homestead or said railroad company.

A. He is a partner of Mr. Jesup, who is president of the Dubuque and Sioux City Railroad Company, and has an office with him. I do not know where he resides. I do not know that he is officially connected with either of said companies. I know he is not an officer or director of either of said companies.

Q. State whether or not you were present when the assignment by either said Homestead Company or said railroad company to Goodnow was made; and, if so, whether said Goodnow was present, and when and where were said assignments, or either of them, made.

A. I know nothing in respect to the matters inquired of.

Q. State by what authority the assignment of the cause of action herein to the plaintiff, Goodnow, was made; whether or not it was

authorized at and by any meeting, either of the stockholders, directors, or any committee of the assignor; and, if so, by which, and when and where was such meeting held, and who composed the same.

A. I know nothing in respect of the matters so inquired of, and cannot answer that question.

Q. State, if you can, which of said companies, the Homestead Company or the railroad company, furnished the money in the first instance with which the taxes on said Webster county lands for the years 1861, '62, and '63, and each thereof, were paid, and whether or not the same was so furnished for the use of the company so furnishing the same; and, if not, for whose use was it furnished, and what adjustment, if any, was subsequently made with respect thereto.

A. I have no personal knowledge in respect to this matter inquired of. The matter, however, has been talked over at the meet-
94 ings of the board when I was present, and I understood from these conversations that the matter was referred to the officers for them to bring suit, and to take whatever measures were necessary. I supposed the taxes had been paid, and these suits were for the purpose of recovering them back. This occurred in the meeting of the board of directors of the Dubuque and Sioux City Railroad Company. These conversations referred to have occurred within the last three or four years.

From John B. Thompson's deposition, filed November 19th, 1881:

I have never had any connection with the Dubuque & Sioux City Railroad Company. I was, however, secretary and treasurer of the Iowa Homestead Company from 1864 to 1873.

Q. State whether or not you had, at the time of and previously to the commencement of the suit in the district court in Webster county, Iowa, by the Iowa Homestead Company against the Des Moines Navigation Company and others, for the purpose of trying the title to certain land lying in Webster county, Iowa, claimed by said companies, respectively, and on which said Homestead Company sought, as alternative relief, the recovery of certain taxes paid by said Homestead Company, knowledge of the fact that said suit was and was to be commenced.

A. I have no knowledge of there being any disputed title to the lands. I cannot now reflect whether I had knowledge of the fact that such suit was or was to be commenced.

Q. If, in answer to the last interrogatory, you say you had knowledge of the suit therein referred to at the time of its commencement, state whether or not you directed, or participated with others in directing, its commencement; and, if so, state the names of all the officers of said Homestead Company and said Dubuque & Sioux City Railroad Company, as far as you can remember, with whom you consulted about the commencement of the same before it was commenced.

95 A. I cannot answer clearly. I suppose it must have been by action of the board directing the secretary and treasurer

to bring the suit. Not having the books I cannot make any references to them. I know that there were no entries on our books for taxes of 1861, 1862, and 1863. The Iowa Homestead Company paid the taxes regularly from 1864 up to 1873, when my connection with the company terminated. I cannot answer where they (the tax receipts) are now. I gave them up in 1873 to the Dubuque & Sioux City Railroad Company. I think there were no taxes paid by the Homestead Company to my recollection from 1859 till 1864.

I only know him (the plaintiff, Edward K. Goodnow) as a partner of Morris K. Jesup & Co. I do not know him in connection with either of these companies.

I know nothing about the assignment of the claim sued upon to plaintiff, and was not present when it was made. Don't know by what authority it was made.

The Iowa Homestead Company held a warrantee deed from the Dubuque & Sioux City Railroad Company, and in addition they held an agreement that they (the Railroad Company) would defend the title at their own expense, which they did.

From Morris K. Jesup's deposition, as follows:

I am president of the Dubuque & Sioux City Railroad Company, and have been since the early part of 1866. I have no relations with the Iowa Homestead Company officially, and never have had.

Who on behalf of said Railroad Company had the chief control and direction of said suit, and who employed, consulted with, and generally gave instructions to the attorneys who had charge of it?

I am president; and I presume if any directions were given, I must have given them—I do not know.

96 He (Edward K. Goodnow, the plaintiff) resides in Brooklyn; I am not aware that he sustains any official relations with either the Land Company or the Railroad Company.

Q. State whether or not you were present when the assignment by either said Homestead Company or said Railroad Company to Goodnow was made; and if so, whether said Goodnow was present, and when were said assignments or either of them made.

A. I do not recollect anything about it.

Q. State whether or not you arranged with said Goodnow for the making to him of either of said assignments; and if so, state whether the same was done orally or by correspondence, and what interest, if any, said Goodnow has in the claims assigned to him, or either of them.

A. Not that I remember; I have no recollection of any arrangement between Mr. Goodnow and the Iowa Homestead Company or the Railroad Company at all.

Q. State by what authority the assignment of the cause of action herein to the plaintiff Goodnow was made, whether or not it was authorized at and by any meeting, either by the stockholders, directors, or any committee of the assignor; if so by which, and when and where was such meeting held; who composed the same.

A. I have no recollection of anything of the kind; I presume, however, if anything of the kind was done it was done by the board of directors; I remember nothing about it.

I do not remember of any record of the proceedings authorizing said assignment having been made.

From J. B. Dumont deposition, as follows:

I have been assistant secretary of the Dubuque & Sioux City R. R. Co. since sometime in 1864, and treasurer since sometime in June, 1876, and secretary of the Iowa Homestead Company since sometime in 1873.

97 Q. State whether or not at any time during the years 1874, 1875, and 1876 you had a conversation with George Crane, Esq., at the city of Dubuque, Iowa, with respect to the commencement of a suit or suits for the recovery of the taxes, or any part of them, paid by the Iowa Homestead Company and said Railroad Company from the year 1859 to the year 1872, both inclusive, or either of them; if so, state what was said in said conversation about assigning the claims respectively of said companies, or either of them, to Mr. Edward K. Goodnow or to any other person, that the same might be sued in name of the assignor.

A. I have no recollection of any such special conversation; Mr. Crane was counsel of the Dubuque & Sioux City Railroad Company, and it is not unlikely that I had some conversation with him; I do not remember what was said. The plaintiff Goodnow resides in Brooklyn, N. Y., and sustains no official or business relations with either company. I do not remember being present when the assignments were made; I do not know whether he (Mr. Goodnow) was present or not; I do not remember when they or either of them were made.

Q. State by what authority the assignment of the cause of action herein to the plaintiff Goodnow was made; whether or not it was authorized by any meeting, either of the stockholders, directors, or of any committee of the assignor, and, if so, by which and when and where was such meeting held, and who composed the same.

[A.] The records of the company are in Dubuque; I do not know; I cannot state by what authority; I cannot state whether any such record of the proceedings authorizing said assignment was made, as the records of the company are in the Dubuque office.

The plaintiff then offered in evidence the original assignments.

They were objected to by defendant because—

98 1. There is no evidence of the authority of the officers by whom it purports to have been executed to execute the same.

2. There is no evidence of the execution of the same by the officers.

3. There is no certificate of acknowledgement as to the assignment relied upon in this case.

The assignment purports to have been made in the State of New York by an Iowa corporation, and no authority is shown for them to transact business outside of the territory creating them.

5. For the reason that the instrument shows it was executed long after these suits were commenced, and there is no evidence that the assignments were ever delivered by the Railroad Company to the plaintiff.

The assignment, a copy of which is attached to the plaintiff's petition and marked Exhibit B, was read in evidence.

Plaintiff then read in evidence a duplicate of the assignment attached to said petition, and the following acknowledgment thereof:

STATE OF NEW YORK, *New York City and County:*

On this 8th day of April, A. D. 1881, before me, a notary public in and for said county, personally came M. K. Jesup, president of the Dubuque and Sioux City railroad, and John B. Dumont, secretary of said company, to me personally known to be the identical persons whose names are affixed to the above instrument as grantors and officers of said company and acknowledge the same to be their voluntary act and deed, and the voluntary act and deed, of said Railroad Company, for the uses and purposes therein mentioned.

Witness my hand and notarial seal.

[SEAL.] J. C. FRENCH,
Notary Public, Kings County.

99 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 1, 1860.

SIR: In reply to your letter of the 29th ultimo, I have to inform you that a letter was addressed to the Commissioner of the General Land Office on the 6th of that month, which was responsive to your application of the 26th June last, for the certification of lists of certain lands to the State of Iowa, under the grants for aid in constructing railroads in that State.

A copy of my letter is now enclosed, with the remark that in the reports of the Commissioner of the General Land Office of the 7th of July and 3d of September, therein referred to, it is not stated whether the lands which you desire to have listed under the railroad grant are, or are not, in whole or part such as have already been certified to the State erroneously, under the grant for the improvement of the Des Moines river. I make this remark, deeming it probable that the Commissioner's objections, as my own, have been chiefly restricted to lands that have been heretofore erroneously certified, and not to all that have been illegally claimed under the Des Moines grant.

Very respectfully, your obedient servant,
J. THOMPSON, *Secretary.*

WASHINGTON, *September 26th*, 1860.

Hon. JOSEPH S. WILSON, *Commissioner General Land Office.*

SIR: Understanding that the Hon. Secretary of the Interior hesitates to comply with my requests of the 26th of June last, for the approval of the Des Moines river lands in Iowa, enuring to the railroads, because it does not appear that the Governor has requested the same. I beg leave to state that the duly authorized agent of the Governor (Mr. Henn), as you are personally aware, did request that these lands should be approved to the roads, and that on Mr.

Henn's leaving Washington, I had full power to act in his
100 stead, which I have since done, and my acts have been recognized. I am likewise authorized by the several companies, the assignees of the State, to do the specific act as well as others.

I make the above statement in order to guard against errors and to disabuse the mind of the Secretary on the point mentioned, and through you, under the circumstances, respectfully renew my previous request.

Very respectfully, your obedient servant,

WM. T. STEIGER, *Agent, etc.*

WASHINGTON, *June 26th*, 1860.

Hon. JACOB THOMPSON, *Secretary of the Interior.*

SIR: Immediately after the recent adverse decision of the Supreme Court of the United States, on the Des Moines river claim to lands above the Raccoon Fork, in the State of Iowa, as the agent of two of the railroads I filed in the General Land Office lists of selection of the interfering lands thus enuring to the roads, in order that they might be approved and certified in the usual form.

The Commissioner of the General Land Office, in acknowledging the receipt of the lists, informed me that the matter, alluding to the Des Moines river conflicting claim, having been placed in train for Congressional intervention, no action could be taken at present upon my application.

Since the adjournment of Congress I have taken particular pains to ascertain what, if anything, had been done, and find that the Committee on Public Lands of the Senate, before whom this matter was pending, have taken no further action upon it since your communication to them on the 11th instant. It will, therefore, under the general rule adopted by the Senate relating to unfinished business, be carried over to the next session.

The difficulty of reporting at the present session, as far as I
101 can learn, had no reference to the rights of the railroads, or doubts as to the correctness of the view expressed by the Department on the 11th instant, that since the decision of the Supreme Court those rights can no longer be called in question, and that they thus save the lands to the State, but whether or not it would be proper or expedient to recommend a grant of lands in addition to those already granted, and, if so, to what extent, as proposed in the resolution substituted by the Department, and the several bills and resolutions before the committee having a similar object.

As these lands, for the cause mentioned, have been held suspended from the commencement of the adjustment of the railroad grants more than three years ago, to the serious disadvantage of the railroad companies, and it is now admitted that there can be no question as to the right of the State to them under the act of May 15th, 1856, I most respectfully but earnestly request that there may be no further delay in certifying the proper lists to the State and the railroad companies, in order that the latter may at once avail themselves of the aid and benefit derived from them in the prosecution of their respective works, as intended by the original grant.

As an additional reason for granting my requests, I beg leave to suggest that if delayed for legislation of Congress at its next session, even should expectation of relief not then be disappointed, it would postpone any final action until after the 4th of March, or to the next

administration. How much longer no reasonable calculation could be made, as it is fair to presume that the new officials would require some time to acquaint themselves with all the facts. This course, if followed, would be as ruinous as it would be unjust to the railroad companies, who are firmly bound to the State, and through it to the United States, for the faithful performance of all the conditions of the grant, including the completion of the roads in the time specified. Besides, whatever the future legislation of Congress
102 may be, it would undoubtedly save our vested rights in the lands, and therefore not interfere with the approval now asked of the Department.

I am, with great respect, your obedient servant,

WM. T. STEIGER, *Agent, etc.*

Endorsed: Department of the Interior, June 28th, 1860. Respectfully referred to the Commissioner of the General Land Office for report. Moses Kelly, chief clerk.

Commissioner Wilson to Secretary Thompson, September 3rd, 1860.

GENERAL LAND OFFICE, *September 3rd,* 1860.

Hon. J. THOMPSON, *Secretary of Interior.*

SIR: I have the honor to return herewith the communication from W. F. Steiger, Esq., of the 10th July last, relative to his application for the certification of certain lands above the Raccoon Fork of the Des Moines river to the Iowa railroads, and respectfully state that we find no reason therein for a change of our recommendation of the 7th July last; that further proceedings in the matter by the departments be delayed until after the close of the next session of Congress.

Very respectfully, your obedient servant,

JOS. S. WILSON, *Commissioner.*

103 *Secretary Thompson to the Commissioner of the General Land Office, September 6th,* 1860.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Sept. 6th,* 1860.

SIR: In the absence of any direct application by the Governor of the State of Iowa for final action in the certification of certain lands common to the claimed limits of the grant to that State for the improvement of the Des Moines river, and the grants for aid in constructing railroads, my opinion is that it will be proper, as you suggest, to delay action until after the close of the next session of Congress.

The papers enclosed with your letters of the 7th of July last and 3d instant, are now returned.

Very respectfully, your obedient servant,

J. THOMPSON, *Secretary.*

GEORGE CRANE, being sworn, testified as follows:

I am rather familiar with the handwriting of Morris K. Jesup; I was not present when the assignment was executed.

My judgment would be that the signature is in the handwriting of Morris K. Jesup.

I am not positive whether the assignment was transmitted to Mr. Jesup by me or not; I think I received it back from him; I do not recollect now of having any correspondence with Mr. Jesup upon the subject of the assignment.

The foregoing is all the evidence introduced or offered by the parties in this suit, or either of them, at the trial or hearing thereof.

After due consideration the court rendered the following decree:

This cause coming up for final hearing this 2d day of October,
104 A. D. 1883, and the same having been duly argued by counsel, and considered by the court, the court finds that the plaintiff, Edward K. Goodnow, is entitled to recover of the defendant, R. B. Chapman, the sum of $955.38-100, being the principal sums paid and interest thereon, only from the commencement of this suit, and further finds that plaintiff is entitled to a lien on the following-described lands, to wit:

The northwest ¼ of section five (5), northeast ¼ of section nineteen (19), township 88, range 27; the east ½ of southeast ¼ of section 1, the northwest fractional ¼ and west fractional ½ of southwest ¼, section 7, township 87, range 27; the northeast ¼ of section 5, south ½ section 9, northeast ¼ of section 17, township 88, range 28, all in Webster county, Iowa, being lands described in petition to secure the payment of said claims, but finds and decides that each forty acres of said lands is liable only for the taxes levied and assessed thereon. It is therefore ordered and decreed that plaintiff have and recover of and from the defendant the said sum of nine hundred and fifty-five and $\frac{38}{100}$ dollars and costs of suit, taxed at $———. It is further decreed that the sum of $29.85 of the sum above found due be, and is hereby, made a special lien on each forty acres of the land above described, from the 28th day of April, 1873, and that a special execution be issued and the lands above described be sold thereunder, in accordance with this decree and the provisions of law, and in the event that said lands do not sell for enough to pay said claim, interest, and costs of suit, that plaintiff have a general execution to make such balance.

And afterwards the plaintiff, Goodnow, gave due notice and perfected his appeal from the decision of the district court to the supreme court of Iowa, and afterwards the defendants gave due notice and perfected his cross-appeal from said judgment to the supreme court of Iowa.

Defendant consents that in computing interest a rest may be made on the 13th day of March, 1883. To which several rulings both parties excepted.

In the following causes the record, pleadings, issues, and evidence are precisely the same in all respects as in the case of Edward K. Goodnow *vs.* R. B. Chapman, except the title of the cause, the allegation as to amount of taxes paid, description of lands, dates,
105 and amounts of taxes paid in the agreed statement of facts and the forms of the decrees, each and all of which are as follows:

EDWARD K. GOODNOW *vs.* SAM'L G. WOLCOTT.

Amounts Alleged to Have Been Paid.

For the year 1864	$112 00
For the year 1865	192 80
For the year 1866	235 25
For the year 1867	140 20
For the year 1868	162 65
For the year 1869	215 35
For the year 1870	251 10
For the year 1871	290 50

Description of Lands.

The northwest quarter section five (5), northeast quarter section 19, township eighty-eight (88), range 27; east half southeast quarter sec. one, northwest fr. quarter and west fr. half of southwest quarter section 7, township 87, range 27; northeast quarter section 5, south half section 9, northeast quarter section 17, township 88, range 28, all in Webster county, Iowa.

EXHIBIT A.

Referred to and Made Part of the Agreed Statement of Facts.

For 1864,	paid	Jan. 16th, 1865	$121 82
" 1865,	"	Nov. 25th, 1865	133 09
" 1866,	"	Feb. 28th, 1867	153 48
" 1867,	"	July 1st, 1868	22 50
" 1868,	"	April 30th, 1869	103 37
" 1869,	"	Feb. 28th, 1870	128 28

106 *Decree.*

EDWARD K. GOODNOW *vs.* SAM'L G. WOLCOTT.

This cause coming up for final hearing this 2d day of October, A. D. 1883, and the same having been duly argued by counsel and considered by the court, the court finds that the plaintiff, Edward K. Goodnow, is entitled to recover of the defendant, Sam'l G. Wolcott, the sum of $504.56, being the principal sum paid, and interest thereon only from the commencement of this suit; and further finds that plaintiff is entitled to a lien on the following-described lands, to wit, the northwest ¼ of section one (1), township 88, range 28; east ½ of section 17, township 88, range 27, all in Webster county, Iowa, being lands described in petition, to secure the payment of said claim; but finds and decides that each 40 acres of said lands are liable only for the taxes levied and assessed thereon. It is therefore ordered and decreed that the plaintiff have and recover from the defendant the said sum of five hundred four and $\frac{56}{100}$ dollars and costs of said suit, taxed at ——.

It is further decreed that $42.04 of the sum above found to be due be, and is hereby, made a special lien on each 40 acres of the land above described from the 28th day of April, 1873, and that a special

execution be issued and the lands above described be sold thereunder in accordance with this decree and the provisions of law; and in the event said lands do not sell for enough to pay said claim, interest, and cost of suit, that plaintiff have a general execution to make such balance.

Defendant consents that in computing interest a rest may be made on the 13th day of March, 1883; to which several rulings both parties excepted.

107 EDWARD K. GOODNOW *vs.* WM. J. MCALPINE.

Amounts Alleged to Have Been Paid.

For the year 1864	$54 25
For the year 1865	91 70
For the year 1866	115 20
For the year 1867	68 50
For the year 1868	85 10
For the year 1869	116 25
For the year 1870	129 15
For the year 1871	149 90

Description of Lands.

All of section 5, township 89, range 28, in Webster county, Iowa.

EXHIBIT A.

Referred to and Made Part of the Agreed Statement of Facts.

For 1864 paid Jan. 17th, 1865	$38 43
" 1865 " Nov. 11th, 1865	54 68
" 1866 " Feb. 28th, 1867	84 09
" 1867 paid by defendant.	
" 1868 " April 26th, 1869	64 26
" 1869 " Feb. 28th, 1870	74 23
" 1870 " Feb. 28th, 1871	142 96
" 1871 " Feb. 29th, 1872	152 98

Decree.

EDWARD K. GOODNOW *vs.* WM. J. MCALPINE.

This cause coming up for final hearing, this 2nd day of October, A. D. 1883, and the same having been duly argued by counsel and considered by the court, the court finds that the plaintiff, E. K. Goodnow, is entitled to recover of Wm. A. McAlpine the sum of
108 eight hundred eighty-one and $\frac{96}{100}$ dollars, being the principal sum paid, and interest thereon only from the commencement of this suit; and further finds that plaintiff is entitled to a lien on the following-described lands, to wit, all of section five (5), township 89, range 28, all in Webster county, Iowa, being lands described in the petition, to secure the payment of said claim.

It is therefore ordered and decreed that plaintiff have and recover of and from the defendant the sum of eight hundred eighty-one and $\frac{96}{100}$ dollars, and costs of suit, taxed at $——.

It is further decreed that this decree be, and is hereby, made a special lien on said land from the 28th day of April, 1873, and that a special execution be issued, and the lands above described, or so much as may be necessary, be sold thereunder in accordance with this decree, ond if the said lands do not sell for enough to pay said claim, interest, and cost of suit, that plaintiff have a general execution to make such balance. Defendant consents that in computing interest a rest may be made on the 13th day March, 1883; to which several rulings both parties excepted.

And afterwards the plaintiff, Goodnow, gave due notice and perfected his appeal from the decision of said district court to the supreme court of Iowa.

And afterwards the defendant gave due notice and perfected his appeal from said decision to the supreme court of Iowa.

GEORGE CRANE,
Attorney for Plaintiff.

Assignment of Errors.

1. The court erred in not allowing interest from the time of payments to the county.
2. The court erred in not allowing plaintiff a lien on all the land for all the taxes paid.
3. The finding of the court is contrary to the law and the evidence in the case.
4. The finding or decision of the court is not in accordance with the law or the equity of the case.

109 5. The evidence shows that plaintiff was entitled to a decree for the taxes paid by his assignor and interest thereon from the time of payments made.

GEORGE CRANE,
Attorneys for Plaintiff.

In the following cause the record, pleadings, issues, and evidence are precisely the same in all respects as in the foregoing cause of Edward K. Goodnow *vs.* Samuel G. Wolcott, except the title of the cause, the allegation as to the amounts of taxes paid, description of lands, dates, and amounts of taxes paid in the agreed statement of facts, and the form of the decree, each and all of which are as follows:

EDWARD K. GOODNOW *vs.* R. B. CHAPMAN.

Amounts Alleged to Have Been Paid.

For 1861, paid October 31st, 1866	$401.25
For 1862, paid December 9th, 1863	195.17
For 1863, paid January 20, 1864	197.20

Description of Lands.

East half of S. E. qr. of sec. 1, northwest quarter and west half southwest quarter section 7, township 87, range 27; northwest quar-

ter of section 5, and northeast quarter of section 19, township 88, range 27; the northeast quarter section 5, south half of section 9, and northeast quarter section 17, township 88, range 28; all in Webster county, Iowa.

110 EXHIBIT A,

Referred to and Made Part of the Agreed Statement of Facts.

For 1863, paid January 20th, 1864 ---------- $107.12

Decree.

This cause coming up for final hearing this 2d day of October, A. D. 1883, and the same having been duly argued by counsel and considered by the court, the court finds that the plaintiff, Edward K. Goodnow, is entitled to recover of the defendant, R. B. Chapman, the sum of one hundred and twenty-seven dollars and ninety-eight cents, being the principal sums paid, and interest thereon only from the commencement of this suit; and further finds that he is entitled to a lien on the following-described lands, to wit: The east half of southeast quarter section 1, northwest quarter and west half of southwest quarter section 7, township 87, range 27; northwest quarter of section 5, and northeast quarter section 19, township 88, range 27; the northeast quarter section 5, south half of section 9, and northeast quarter section 17, township 88, range 28, all in Webster county, Iowa, being the lands described in the petition, to secure the payment of said claim; but finds and decides that each forty acres of said lands are liable only for the taxes levied and assessed thereon.

It is therefore ordered and decreed that the plaintiff have and recover from the defendant the said sum of $127.98 and costs of suit, taxed at —— dollars.

It is further decreed that four dollars of the sum above found to be due be, and are hereby, made a special lien on each 40 acres of the land above described from the 28th day of April, 1873, and that a special execution be issued and the lands above described be sold thereunder in accordance with this decree and the provisions of law; and in the event said lands do not sell for enough to pay said claim, interest, and costs of suit, that plaintiff have a general execution to make such balance.

111 Defendant consents that in computing interest a rest may be made on the 13th day of March, 1883; to which several rulings both parties excepted.

Both of the foregoing causes were submitted at the same time and determined by the district court upon the record, pleadings, issues, and evidence above mentioned, which was all the evidence offered or introduced by the parties at the trial of said causes.

In each of said suits an appeal and cross-appeal were duly taken and perfected according to law.

And said causes are hereby submitted to this court on the same record, pleadings, evidence, assignment of errors, and arguments of counsel, with the changes necessary to make the same applicable in each cause.

And it is hereby stipulated and agreed that both of above-entitled suits may be submitted to and tried by this court upon this record and abstract, and that both shall be submitted together and at one hearing.

Signed this 30th day of November, 1883.

THEO. HAWLEY,
Def't's Att'y.
GEO. CRANE,
Att'y for Pl'ff.

112 & 113 And upon the foregoing record said cause was duly submitted at the regular June term, 1884, of said supreme court. And the court, having fully considered said record and the arguments presented by counsel, filed its decision on the 4th day of December, 1884, the same being in the words and figures following, to wit:

114 Dec. 4, 1884.

"EDWARD K. GOODNOW, Appellant,
vs.
SAM. G. WOLCOTT,
&
EDWARD K. GOODNOW, Appellant,
vs.
R. B. CHAPMAN. } No. 10772.

Appeals from Webster dist. court.

George Crane, for appellant.
Theodore Hawley, for appellee.

ROTHROCK, Ch. J.

These cases involve substantially the same questions which have been determined by this court in Goodnow *vs.* Litchfield, 19 N. W. Rep., 226; Goodnow *vs.* Stryker, 17 N. W. Rep., 506; and in Goodnow *vs.* Chapman, 21 N. W. Rep., 103, and other cases.

115 The only question made in these cases which does not appear to be made in the last of the above cases is that the lands were not taxable for the years 1861 and 1862. In Goodnow *vs.* Stryker, *supra*, it was held that the lands were taxable for those years.

The same decision and judgment will be entered in these cases as in the case of Goodnow *vs.* Chapman, the opinion in which was filed Oct. 23, 1884.

Reversed."

116 And the plaintiff (def't in error) moving for final judgment and decree in the supreme court of Iowa, such motion was sustained; and on the 11th day of December, 1884, it being of the regular December term 1884, of said court, judgment and decree were duly approved and entered of record, the same being the final judg-

ment of said supreme court, and in the words and figures following, to wit:

117 EDWARD K. GOODNOW *vs.* R. B. CHAPMAN.

This cause coming on for final hearing this 11th day of Dec., A. D. 1884, the parties appearing, by their respective attorneys, and the court having duly considered the issues, the evidence, and the arguments of counsel, finds the issues in favor of the plaintiff. It is, therefore, ordered, adjudged, and decreed that Edward K. Goodnow, the plaintiff, have and recover of and from R. B. Chapman, the defendant, the sum of two hundred [and] thirty and $\frac{18}{100}$ dollars and interest thereon at the rate of six per cent per annum from the 13th day of March, A. D. 1883, and costs of suit taxed at one hundred [and] forty-seven and $\frac{15}{100}$ dollars. That this decree be, and is hereby, made a special
118 lien on the following-described lands: The northwest quarter of section five (5) and the northeast quarter of section nineteen (19), in township eighty-eight (88), range twenty-seven (27); the east half of the southeast quarter of section one (1), the northwest fractional quarter and the west fractional half of the southwest quarter of section seven (7), in township eighty-seven (87), and the range (27) twenty-seven; the northeast quarter of section five, the south half of section nine (9), and the northeast quarter of section seventeen, in township eighty-eight (88), range twenty-eight (28), all in Webster county, Iowa, from the 28th day of April, A. D. 1873. That the plaintiff have a special execution, that the lands above described, or as much thereof as may be necessary, be sold
119 thereunder according to law, and the proceeds of such sale be applied in payment of this decree and all costs of suit, and that the defendant and all persons claiming by, through, or under him be forever barred and foreclosed of and from all right and equity of redemption in and to said lands and every part thereof."

"Received a copy of the within proposed decree, this seventh day of November, 1884.

THEO. HAWLEY,
Def't's Att'y.

And at the same time, at the request of the defendant (pl'ff in error), a supplemental decree was approved by the court and the — was duly made a part of the record in said cause, said supplemental decree, being in the words and figures following, to wit:

120 "EDWARD K. GOODNOW, Plaintiff,
vs.
R. B. CHAPMAN, Defendant.

And now, on the application of the defendant, R. B. Chapman, it is certified by the court here and ordered to be made part of the record herein, that by his answer and on the hearing of said cause the defendant claimed immunity from the entire demand and claim of plaintiff on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff's assignor, The Dubuque

& Sioux City Railroad Company, by the Supreme Court of the United States in the case of The Iowa Homestead Company *vs.* The Des Moines Navigation and Railroad Company and this defend-
121 ant and others, at the October term thereof, A. D. 1872, which case was, as defendant claimed and maintained in this court, prosecuted by the said Dubuque & Sioux City Railroad Company for its own use and benefit in the name of the said Iowa Homestead Company, and that plaintiff's said assignor was therefore in such sense a party to said suit as to be found and concluded herein by said adjudication therein, and that our decision herein was and is against the immunity so claimed by this defendant."

122 On the 3d day of February, 1885, there was filed in the office of the clerk of said supreme court a writ of error for the removal of said cause to the Supreme Court of the United States.

And on the same day, in connection with said writ of error, was filed a writ of error bond, duly approved.

And on Feb'y 16th, 1885, the citation was filed in the office of said clerk. Said writ of error, bond, and citation, with the endorsements thereon, are in the words and figures following, to wit:

123 "UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court before you, between Edward K. Goodnow and Richard B. Chapman, wherein was drawn in question the validity of the authority exercised under the State of Iowa, on the ground of its being repugnant to the laws of the United States, and the decision was in favor of the validity of such authority, and wherein certain rights, privileges, and immunities were claimed under a certain judgment of the Supreme Court of the United States and authority exercised under the
124 United States, and the decision was against the rights, privileges, and immunities so claimed, a manifest error hath happened, to the great damage of the said Richard B. Chapman, as by his complaint appears: We being willing that error, if any hath been, shall be duly corrected and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that there, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings
125 aforesaid being inspected of, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 3rd day of February, 1885.

EDWARD R. MASON,
Clerk United States Circuit Court, Southern Dist. of Iowa, Central Division.

[SEAL.] JOSEPH M. BECK,
Chief Justice of the Supreme Court of the State of Iowa."

126 "Know all men by these presents, that we, Richard B. Chapman and E. D. G. Morgan and the Fort Dodge Coal Company, sureties, are held and firmly bound unto Edward K. Goodnow in the full and just sum of five hundred dollars, to be paid to said Edwark K. Goodnow, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Signed with our hands and dated this 26th day of January, 1885.

Whereas lately at a term of the supreme court of Iowa, in a suit depending in said court between Edward K. Goodnow, plaintiff, and Richard B. Chapman, defendant, judgment was rendered against the said Richard B. Chapman, and the said Richard B. Chapman
127 having obtained a writ of error and filed a copy thereof in the clerk's office of said court to remove the judgment in the aforesaid suit, and a citation directed to the said Edward K. Goodnow, admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Richard B. Chapman shall prosecute the said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise, in full force and virtue.

RICHARD B. CHAPMAN.
E. D. G. MORGAN.
FORT DODGE COAL CO.,
By J. L. PLATT, *Pt.*

128 STATE OF NEW YORK, } ss:
St. Lawrence Co., }

On this 26th day of January, 1885, before me personally came Richard B. Chapman, to me known to be one of the persons described in and who executed the above bond, and acknowledged that he executed the same.

[SEAL.] E. N. MERRIAM,
Notary Public, State of New York.

STATE OF IOWA, } ss:
Webster County, }

I, E. D. G. Morgan, the surety in the within bond, do say, upon oath, that I am worth in real estate in the State of Iowa, not ex-

empt from execution, over and above my liabilities, double the full amount of the within bond; that the said real estate above
129 mentioned does not include a homestead; that it is owned by me and duly recorded in my name; that the same is free from incumbrances.

E. D. G. MORGAN.

STATE OF IOWA, }
Webster County, } *ss:*

Subscribed and sworn to before me, this 29th day of January, 1885.

[SEAL.] THEO. HAWLEY,
Notary Public, Webster Co., Iowa.

STATE OF IOWA, }
County of Webster, } *ss:*

I, M. H. Bliss, clerk of the district court of the county and State aforesaid, do hereby certify that I consider the sureties, E. D. G. Morgan [and] J. L. Platt, whose names are subscribed to the foregoing bond are good and sufficient for the sum therein named, and
130 I, as said clerk, would accept and approve the same if presented to me in this county for the purposes therein set forth.

Witness my hand and seal of the district court, this 29th day of January, 1885.

[SEAL.] M. H. BLISS,
Clerk District Court.

STATE OF IOWA, }
Webster County, } *ss:*

I, J. L. Platt, being duly sworn, *or* depose and say that I am the president of the Fort Dodge Coal Company, the surety named in the within bond; that said company is a citizen, resident, and freeholder in the State of Iowa, and is worth in real estate, in said State, not exempt from execution, and over and above all its liabilities, double the full amount of the within bond; that said real estate does
131 not include a homestead, and that it is owned and duly recorded in the name of said company.

J. L. PLATT.

Subscribed by J. L. Platt in my presence, and sworn to by him before me, this 29th day of January, A. D. 1885.

[SEAL.] THEO. HAWLEY,
Notary Public, Webster Co., Iowa."

"This bond is approved this Feb'y 2, 1885.

J. M. BECK,
Chief Justice."

132 "The United States of America to Edward K. Goodnow, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second

Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Iowa, wherein Richard B. Chapman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph M. Beck, chief justice of the supreme court of the State of Iowa, this 2d day of February,
133 in the year of our Lord one thousand eight hundred and eighty-six.

JOSEPH M. BUCK,
Chief Justice Supreme Court of Iowa.

Service of the within citation acknowledged this 5th day of February, 1885.

GEORGE CRANE,
Att'y for E. K. Goodnow."

134 RICHARD B. CHAPMAN, Pl'ff in Error,
vs.
EDWARD K. GOODNOW, Def't in Error.

STATE OF IOWA:

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record in said cause, consisting of the abstract, decision of said court, final judgment entry, & supplemental decree, together with copies of writ of error, writ of error bond, and citation, as full, true, and complete as the same remain on file and of record in my office; and such transcript is made for and at the request of George Crane, att'y for def't in error.

Witness my signature and the seal of said court, this 11th day of March, 1885.

G. B. PRAY,
Cl'k Sup. Court of Iowa.

Endorsed on cover: Iowa supreme court. No. 1285. Richard B. Chapman, plaintiff in error, *vs.* Edward K. Goodnow. Filed March 18, 1885.

123-5-27
No 1284

SUPREME COURT OF THE UNITED STATES.

R. B. CHAPMAN, *Plaintiff in Error*,

vs.

EDWARD K. GOODNOW, *Defendant in Error*.

THEO. HAWLEY and C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

DEFENDANT'S BRIEF

Argument on Motion to Quash Writ of Error.

Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Iowa, wherein Richard B. Chapman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph M. Beck, chief justice of the supreme court of the State of Iowa, this 2d day of February,
133 in the year of our Lord one thousand eight hundred and eighty-six.

JOSEPH M. BUCK,
Chief Justice Supreme Court of Iowa.

Service of the within citation acknowledged this 5th day of February, 1885.

GEORGE CRANE,
Att'y for E. K. Goodnow."

134 RICHARD B. CHAPMAN, Pl'ff in Error,
vs.
EDWARD K. GOODNOW, Def't in Error.

STATE OF IOWA:

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record in said cause, consisting of the abstract, decision of said court, final judgment entry, & supplemental decree, together with copies of writ of error, writ of error bond, and citation, as full, true, and complete as the same remain on file and of record in my office; and such transcript is made for and at the request of George Crane, att'y for def't in error.

Witness my signature and the seal of said court, this 11th day of March, 1885.

G. B. PRAY,
Cl'k Sup. Court of Iowa.

Endorsed on cover: Iowa supreme court. No. 1285. Richard B. Chapman, plaintiff in error, *vs.* Edward K. Goodnow. Filed March 18, 1885.

123-527

No 1284

SUPREME COURT OF THE UNITED STATES.

R. B. CHAPMAN, *Plaintiff in Error*,

vs.

EDWARD K. GOODNOW, *Defendant in Error*.

THEO. HAWLEY and C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

DEFENDANT'S BRIEF

Argument on Motion to Quash Writ of Error.

1784

SUPREME COURT OF THE UNITED STATES.

R. B. CHAPMAN, *Plaintiff in Error*,

vs.

EDWARD K. GOODNOW, *Defendant in Error*.

Writ of Error to the Supreme Court of Iowa.

Argument on motion to Quash Writ of Error.

I

In the state of Iowa, it is settled law that where one person pays the taxes levied upon the lands of another, in good faith and not officiously, the person making the payment can recover from the owner of the lands, on an implied promise, the amount so paid. This suit was brought to recover taxes claimed to be due under this rule.

The facts are as follows:

From 1860 to 1873, the title to what are known as the "Des-Moines River lands," situated in Webster county, state of Iowa, was in dispute between different claimants thereto. The Iowa Homestead company, the grantee of the Dubuque & Sioux City Railroad company, claimed title under an act of Congress approved May 15, 1856, granting lands to the state of Iowa to aid in building certain railroads in that state. The DesMoines Navigation & Railroad company and its grantees claimed the ownership of the same lands, under an act of Congress approved August 8, 1846, granting lands to the territory of Iowa to aid in the improvement of the navigation of the DesMoines river, and by virtue of a resolution passed by the two houses of Congress, March 2d, 1861.

In 1868, the Homestead company commenced suit against the DesMoines Navigation and Railroad company and its grantees, including R. B. Chapman, plaintiff in error, to establish title to said lands, and as alternative relief asked, in case of failure to obtain the title, to have judgment against the several defendants in said suit for the taxes, which it had paid on said lands during the continuation of the controversy. This suit was commenced in the district court of Webster county, Iowa, and was afterwards transferred to the circuit court of the United States for the district of Iowa. At the final hearing in the circuit court the petition was dismissed. On appeal to this court the decision below was in form affirmed, and an opinion delivered denying the right of plaintiff to recover the taxes.

During the continuation of the above controversy about the title to said lands, the Iowa Homestead company paid the taxes levied thereon by the state authorities. This action was brought to recover from Chapman the taxes paid upon his lands.

II.

1. It is claimed that there are two grouuds on which this court can take jurisdiction. In the first place it is insisted that the decree in the said Homestead suit is a bar to the right of recovery in this action, and that the refusal of the state court to so hold authorizes a writ of error to this court. In reply to this point, the defendant in error claimed that long subsequent to the decree in the Homestead suit the plaintiff in error recognized the payment of said taxes by said Homestead company, took advantage of such payment, and thereby became liable on a new implied promise to repay said taxes.

Rev 3+5

After the commencement of this action, Webster county intervened as plaintiff, alleging in its petition, that the taxes on the lands had not been paid, and asking judgment against the plaintiff in error, for the amount thereof, and interest. To defeat the claim of the county, the plaintiff in error set up as a defense the payment of the taxes made by the Homestead company. The state court held this constituted a recognition of the act of payment by the Homestead company, and laid the foundation for an implied promise to repay to said company the amount of taxes so paid by it. The Iowa Homestead company assigned

and transfered its claim for said taxes, paid on said lands, to Goodnow, the defendant in error. The decision of the state court, holding that the recognition of the payment raised a new promise is the first ground on which the plaintiff in error claims jurisdiction for this court.

2. Another reply to the plea of former adjudication, is that the federal courts had no jurisdiction of the Homestead suit, that the want of jurisdiction appeared affirmatively on the face of the record, and hence, that the decree rendered therein, was necessarily void.

The petition in the said suit of the Iowa Homestead company against the Des Moines Navigation & Railroad company, and others contained the following passages:

The petition of the Iowa Homestead company shows that said company is a corporation duly *created by the laws* and a *citizen of Iowa*.

Of these lands the fifty thousand acres lying east of the Des Moines river are claimed by the Des Moines Navigation & Railroad company *a corporation created by the laws of Iowa*, and its assigns.

After the settlement of the state with the Des Moines Navigation company in 1858, the said Navigation company conveyed certain parcels of the land, now claimed by plaintiff to the following persons: Among others, Samuel G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Edwin C. Litchfield, W. J. McAlpin, Richard B. Chapman.

The cause was submitted to this court on the following stipulation:

It is agreed that the only questions submitted on this hearing are

1. In which of the parties is the paramount title to the lands in controversy.

2. If the title shall be adjudged to be in the defendant, the Des Moines Navigation & Railroad company, is the plaintiff entitled to be reimbursed the taxes which it has paid on the lands.

The defendant in error insists that under the pleadings and the agreed issues in the Homestead suit, the Des Moines Navigation & Railroad company was a necessary and indispensable party defendant, and being a citizen of the same state with the plaintiff, the federal courts had no jurisdiction of that suit.

III.

The second ground upon which jurisdiction is claimed, is set forth in the certificate as follows;

> And it is further certified and ordered to be made a part of the record herein, that by defendant's answer, and on the hearing in said cause, defendant claimed immunity from said entire claim and demand, because, as was claimed and alleged, the alleged cause of action not having accrued within six years, immediately preceding the commencement of this action, was barred by the statutes of limitation, of the state of New York, and that to determine whether or not it was so barred, it became material and necessary to decide whether or not the decision of the Supreme Court of the United States in the case of Samuel G. Wolcott vs. the Des Moines Navigation & Railroad company, reported in 5 Wallace 681 was a final determination of the question of title therein decided, in order to determine when the plaintiffs' cause of action accrued, and that our decision herein, was and is, that said decision was not a final determination of said question, and was and is against the immunity so claimed, because of said decision, that said determination was not final.

Prior to 1870, the statutes of Iowa contained the following section:

> When a cause of action has been fully barred by the laws of any country, where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter.

In the year 1870, the above was amended by adding thereto the following;

> But this section shall not apply to causes of action arising within this state.

This clause went into operation April 29, 1870, as shown by the general laws of the state.

Under the law of Iowa, where one party pays the taxes upon the land of another, it is necessary, in order to recover them from the owner of the land, to show that the payment was made in good faith, and not officiously.

As long as the Homestead company carried on the litigation in good faith, and under the sincere belief of ownership in itself, the right to pay the taxes, and in case of defeat, recover them back from the other party, continued. And of course

during such *bona fide* litigation, no cause of action accrued to the Homestead company to recover the taxes thus paid.

In the case of Wolcott vs. the Des Moines Navigation & Railroad company, 5 Wall. 681, decided by this court in 1867, both parties were interested in having the title of defendant sustained. After the case was appealed to this court, counsel for the Homestead company was permitted to appear and argue the questions raised by the record as made by the parties to that suit. But notwithstanding the permission thus given and the final decision of this court in that case the Supreme Court of Iowa held that as much as the Homestead company was not a party to that action, the decision therein was not proof that the subsequent suit of that company against the DesMoines Navigation & Railroad company was carried on in bad faith, or that the payment of taxes thereafter was officious.

The plaintiff in error claims that the decision in the Wolcott case in 1867, finally settled the question of title to the "Des-Moines River lands" that any litigation about title after that date was in bad faith, and that the payment of taxes after that was necessarily officious, and hence that the statute of limitation began to run at the date of that decision. The state court held otherwise.

ARGUMENT.

IV.

Since the passage of the amendatory act of February 5th, 1867, the old rule that forbade this court to examine state court opinions to ascertain what had been decided, has been abrogated. We understand that it is now the established practice of this court to look into the opinions of the state courts for the purpose to ascertain the points there decided. Thus in the case of Murdock vs. Memphis, 20 Wall. 633, this court, speaking of the change made by the act of 1867, uses this language:

> And though we have repeatedly decided that the opinions of other state courts cannot be looked into to ascertain what was decided, we see no reason since this restriction is removed, we should not so far examine those opinions when properly authenticated as may be useful in determining the question. We have been in the habit of receiving the certificate of the court, signed by the Chief Justice, or a presiding officer, on that point, though not as conclusive, and these opinions are quite as satisfactory, and

"may more properly be treated as part of the record than such certificate."

Murdock vs. Memphis, 20 Wall. 633.

McManus vs. Sullivan, 91 U. S. 575.

In their opinion in this case the Supreme Court of Iowa use the following language:

"The facts of the case and questions of law involved are the same as those in Goodnow vs. Stryker, 16 N. W. Report, 486. Following the case mentioned, the decree of the district court is reversed."

Rec 66

By reference to the opinion in the case against Stryker, we can ascertain exactly upon what ground the state court based its decision in this case. In that case the court used this language:

The defendant pleaded as one of his additional defenses that the plaintiff's right of recovery is barred by a prior adjudication, to wit an adjudication in the case of the Iowa Homestead company vs. Des Moines Navigation & Railroad company reported in 17 Wall. 153. To this plea the plaintiff replies in substance, that if it should be conceded that the court made an adjudication in that case, denying a right of recovery for the taxes in question in this case, yet this action is not barred because a right of recovery has arisen since that time. The fact relied upon as giving such right of recovery, is that defendant now claims as he did not then, the benefit of the payments made by the Homestead company. After the action was instituted, a petition was filed in the case of Webster county, avering among other things, that the taxes in question had never been paid by any one, and that the same are now due to the county from the defendant. To this petition, the defendant answered, avering that all of said taxes mentioned in said petition were duly paid by the Iowa Homestead company, * * * and said defendant is no longer liable therefor. The question presented is as to whether if the payments in the first instance were officious, as we may assume was held, and defendant for that reason was not liable the subsequent adoption of the payments for the purpose of escaping liability to the county, should be regarded as an adoption of the payment as between the defendant and plaintiff.

If the plaintiff's assignor had made the payments in the name of the defendant as his assumed agent, any act of the defendant indicating an intention to claim the benefit of the payments, would constitute a ratification of the acts by which the payments were made. But the defendant contends that the case is different where a person pays another person's debts, not under a claim of acting for such person; but under the mistaken sup-

position that the debt is due from himself. The defendant's position is that in such case, there is no act of assumed agency to ratify.

It must be conceded we think, that in one sense this is so. The plaintiff's assignor did not hold himself out as the defendant's agent. Nevertheless, when the defendant claims the benefit of the payments he elects to treat the acts of payment as done for himself. Having elected to so treat the acts, he ought not to complain if the court treats them in the same way. Natural justice certainly requires that if the defendant *has the benefit of the payments as discharging his liability to the county, he should reimburse the plaintiff*, whose assignor made the payments. * * * But, if he chooses not to ignore, but to claim the benefit of it, we see no reason why we may not regard him as treating the act of payment as done for him; and if we do so regard him *there is no difficulty in finding an implied promise* to reimburse the payor his assignee.

It will be observed that the state court rests its opinion as to the liability for the taxes paid upon a promise made after the decision in the Homestead suit was rendered. It is not therefore possible that the question could have been adjudicated in that suit.

This view is sustained in the most explicit manner by this court, in Linton vs. Stanton, 12 How. 426, a case that is strictly analogous in every essential feature to the case at bar. In that case the plaintiff sued the defendant on certain promissory notes. The defendant set forth as a defense to the claim a discharge in bankruptcy subsequent to the making of the notes. The plaintiff replied that after the discharge in bankruptcy, the defendant promised orally and in writing to pay the notes. The Supreme Court of Lousiana held that the subsequent promise to pay the notes was valid and binding, notwithstanding the discharge by the bankrupt court.

In determining the question of jurisdiction this court said:

Nor has this court the power to examine into the other question which appears to have arisen as to the legal effect of certain promises which the defendant is alleged to have made after he obtained his certificate in the bankrupt court. The legal obligation of such promises depends upon the laws of the state, in which they are made; and in a suit in a state court, the decision of that question by the highest tribunal of the state cannot be reviewed in any court of the United States.

Linton vs. Stanton 12 How. 426.

V.

It is claimed by the plaintiff in error that the question whether there was a ratification of the act of payment, is not raised by the pleadings. It is sufficient answer to this point to say that the state court held that the question was properly before it, and that the pleadings were sufficient. Even if the state court committed an error in holding the pleadings sufficient to raise the question, it is not a matter that this court can review. It was perfectly competent for the state court to admit evidence occurring after the commencement of the suit to prove up the issues raised by the original pleadings. An error in this regard would not raise a federal question. In short, the state court having decided that an implied promise was sufficiently pleaded, and fully proved by the evidence, this court clearly has no authority to review the questions thus decided.

Murdock vs. Memphis, 20 Wall. 633.

New York Insurance Co. vs. Hendren, 92 U.S 286.

There are some principles of law that are recognized by all the text writers, and are never questioned by the courts. We here state some of them:

The request which is necessary to support an *executed consideration*, if it has not been made in express terms will be implied in the following circumstances:

First. Where the consideration consists in the plaintiff having been compelled to do that to which the defendant was legally compellable.

Secondly. Where the defendant has *adopted and enjoyed the benefit of the consideration*, for here his subsequent assent amounts to a *ratihabitio*, and such ratification may be relied on as evidence of a previous request. And,

Thirdly. When the plaintiff voluntarily does that to which the defendant was legally compellable, and the defendant afterwards in consideration thereof *expressly promises*.

The state court decided this case in favor of the plaintiff, expressly on the ground that the evidence showed that subsequent to the alleged adjudication the plaintiff in error took advantage

of or ratified the act of payment, and thereby impliedly promised to repay the said taxes.

To illustrate further, suppose the plaintiff in error, after the decision in the Homestead suit, had given to the defendant in error his promissory note for the amount of the taxes paid and interest. Suppose, also, that the state court had decided that such note was founded upon a valid consideration, and therefore binding. Would it be contended that such a ruling would involve a federal question? Most certainly not. In the case at bar, the subsequent promise was implied and not expressed, but this difference is of no moment in connection with the question of federal jurisdiction. In both instances the decicion of the state court is upon matters of general law only, and in both instances full force and effect is given to the decision of the federal court.

Now it may be assumed that at the time this court rendered its decision in the Homestead suit, there was no cause of action. At that time all the facts necessary to complete the right of recovery had not transpired. The fact thus wanting was the recognition of the payment, the *adoption* and *enjoyment of the benefit of the consideration.* Until this occurred the bringing of the suit was premature. Of course a judgment in an action prematurely brought cannot be a bar to an action brought after the cause there of has become complete. The position of the adverse counsel is directly the opposite. He is asking this court to take cognizance of this case and reverse the decision of the state court by deciding that that court could not base a right of recovery upon a subsequent implied or expressed promise because such promise is based upon an *executed consideration* that this court had previously held insufficient to support an action independent of such promise. In other words, counsel's position is that the state court was bound to treat the judgment of this court in 1872, as an adjudication upon all subsequent promises, either express or implied.

Freeman on judgments, 368.

Hurst vs. Means, 2 Sneed, 549.

The question whether the circumstances were such as to justify the state court in implying a new promise, is one relating exclusively to general law and involves no question of federal cognizance.

New York Ins. Co. vs. Hendren, 92 U. S. 286.
Kennebec R. R. Co. vs. R. R. Co. 14 Wall 25.
Gibson vs. Chontean, 8 Wall. 314.

VI.

In the Homestsad suit, the face of the record shows *affirmatively* that the controversy therein was one between *citizens of the same state*, and therefore not within the jurisdiction of the federal courts. This position is established beyond the possibility of doubt by the decisions of this court.

Shainwald vs. Lewis 108 U. S. 158.
Cameron vs. McRoberts 3 Wheaton 591.
Coal company vs. Blatchford 11 Wall. 174,
Strawbridge vs. Curtis 3 Cranch 267.

VII.

1. The second ground upon which jurisdiction is claimed, is wholy unfounded in either law or fact. It is based upon the remarks of the state court in reference to the decision of this court in the case of Wolcott against the Des Moines Navigation & Railroad company. It is claimed that the cause of action in the case at bar accrued if at all, at the time of the decision in that case, or in the year 1867. Now if this were true in point of fact, it would not help the plaintift in error a particle. He is seeking to apply the statute of limitations of New York, which bars an action on an implied promise in six years. But that statute could have no effect after 1870, upon a cause of action arising in the state of Iowa.

Higgins vs. Mendenhall 42 Iowa 656.
Goodnow vs. Stryker 14 N. W. Rep. 347.

2. Another ground upon which jurisdiction is claimed, is that the state court decided that the statute of limitation did not begin to operate when this court decided the Wolcott and Burr cases reported in 5 Wall. 581. The ruling of the state court was that the Iowa Homestead suit was carried on in good faith notwithstanding the decision of this court in the above cases.

and that therefore the payment of the taxes sued for was not officious. The truth is, the Homestead company had no interest in the Wolcott and Burr cases whatever, nor in the lands in controversy therein. The only effect that the judgment in those cases could have, was to establish the title to the lands involved in those suits, in one of the parties thereto. That full force and effect was given to said judgments, cannot be denied. As the state court was not called upon in this suit to give effect to said judgments and it was not possible for it to do so, it is simply absurd to say that it refused to give them effect. But it is clear that when a cause of action accrues under the statutes of Iowa, or when the statute of limitation begins to run, is necessarily a question for the determination of the state and not the federal courts.

Lytle vs. Arkansas 22 How. 203.

Marguez vs. Bloom 16 Wall. 351.

New York Ins. Co. vs. Hendren 92 U. S. 286.

All of which is respectfully submitted for the consideration of this court.

GEO. CRANE,
Attorney for Defendant in Error.

No 1285

SUPREME COURT U.S.
WASHINGTON, D.C.
APR. 6 1885
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

R. B. CHAPMAN, *Plaintiff in Error*,

vs.

EDWARD K. GOODNOW, *Defendant in Error*.

THEO. HAWLEY and C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

DEFENDANT'S BRIEF

In Support of Motion to Dismiss Writ of Error.

- 4 JUL 1945

SUPREME COURT OF THE UNITED STATES.

R. B. CHAPMAN, *Plaintiff in Error*,

vs.

EDWARD K. GOODNOW, *Defendant in Error*.

THEO. HAWLEY and C. H. GATCH, for Plaintiff in Error.
GEORGE CRANE, for Defendant in Error.

On Error from the Supreme Court of Iowa.

Brief in Support of Motion to Dismiss Writ of Error.

STATEMENT.

During the years 1861, 2, 3, the title to what are called the "Des Moines River lands," situated in Webster county, Iowa, was in controversy between different claimants thereto. The Dubuque & Sioux City Railroad company claimed title under the act of congress, approved May 15, 1856, granting lands to the State of Iowa, to aid in the construction of certain railroads in that state. The Des Moines Navigation & Railroad company and its grantees, claimed title under the act of congress, approved August 8, 1846, granting lands to the territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, and the joint resolution passed by the two houses of congress, March 2, 1861. The plaintiff in error is one of the grantees of the last named company. By the decisions of the courts, the title to said lands was finally established in the Des Moines Navigation & Railroad company, and its grantees.

While this controversy was going on, the Dubuque and Sioux City Railroad company, the party ultimately defeated in the contest, paid the taxes which were assessed upon the lands in dispute. This suit is brought to recover from the plaintiff in error, the taxes thus paid upon his lands. Under the law of Iowa, where one person pays the taxes assessed upon the lands of another in good faith, and not officiously, the person so paying can recover the amount thus paid, from the owner of the lands. The railroad company assigned its right to recover the taxes paid during the controversy about title to the defendant in error.

The ground upon which jurisdiction is claimed in this suit is set out in the following certificate by the state court:

> And now on the application of the defendant, R. B. Chapman, it is certified by the court here, and ordered to be made part of the record herein, that by his answer and on the hearing of said cause, the defendant claimed immunity from the entire demand and claim of plaintiff on the ground that as he claimed the same demand and claim had been adjudicated against plaintiff's assignor, the Dubuque and Sioux City Railroad company by the Supreme Court of the United States, in the case of the Iowa Homestead company vs. the Des Moines Navigation & Railroad company, and this defendant and others at the October term thereof, A. D., 1872, which case was as defendant claimed and maintained in this court, prosecuted by the said Dubuque & Sioux City Railroad company, for its own use and benefit, in the name of the said Iowa Homestead company, and that plaintiff said assignor was therefore in such sense a party to said suit as to be barred and concluded herein, by said adjudication therein, and that our decision herein was and is against the immunity so claimed by this defendant."

In 1868, the Homestead company commenced suit against the Des Moines Navigation & Railroad company and its grantees, including R. B. Chapman, plaintiff in error, to establish title to said lands, and as alternative relief asked, in case of failure to obtain the title, to have judgment against the several defendants in said suit for the taxes, which it had paid on said lands during the continuation of the controversy. This suit was commenced in the district court of Webster county, Iowa, and was afterwards transferred to the circuit court of the United States for the district of Iowa. At the final hearing in the circuit court, the petition was dismissed. On appeal to this court, the decision below, was in form affirmed, and an opinion delivered denying the right of plaintiff to recover the taxes.

The allegations in the pleadings in the Homestead suit, pertaining to the taxes therein sued for, are the following:

The said plaintiffs have been in possession of the lands claimed by them themselves, or their grantees in contract since 1861. They have paid the taxes thereon to the state of Iowa since, in all amounting to eighty thousand dollars, and if their title has failed, they are entitled to have their taxes refunded since 1861, by the holder of the legal title who has not paid them.

The prayer says:

That in the event of a decree that the plaintiffs' present title or any part of it has failed the said Des Moines Navigation & Railroad company and its assigns may be decreed to repay the plaintiff all the taxes which he has paid on said land and interest thereon.

In their answer the defendants denied the allegations in the petition.

It is not claimed by the plaintiff in error that the Dubuque & Sioux City Railroad company, the assignor of the defendant in error was a party to the record in the Homestead suit. It is insisted however, that that company was the real substantial plaintiff in that case.

The following is the testimony relied upon to prove that fact:

John B. Thompson (Rec. 86.) says he was secretary and treasurer of the Iowa Homestead company during its existence from 1864 to 1873. That within a year after Morris K. Jesup became president of the Dubuque & Sioux City Railroad company, which, according to Jesup's own testimony, (Rec. 95,) was in the early part of the year 1866, the railroad company became the owner of five-ninths of the stock of the Homestead company, and that after such change in the ownership of stock, the board of directors of the Homestead company was changed, and that the railroad company "by owning a majority of the stock, controlled the Homestead company, and that "after Jesup became president of the railroad company, all stock of the Homestead company held by the directors of the railroad company, was transferred to the railroad company, amounting to five-ninths of the whole stock. On page 89 of the record, the same witness says referring to the former suit of the Homestead company vs. the Navigation company and others: "The Iowa Homestead company never paid a dollar of the expenses. It was never discussed at the Iowa Homestead company's meetings."

Morris K. Jessup, (Rec. 95.) referring to the same suit in answer to the question, "Who on behalf of said railroad company had the chief control and direction of said suit and who employed, consulted with, and generally gave directions to the attorneys who had charge of it." Said: "I am president and I presume if any directions were given I must have given them. I do not know."

The original amount of taxes paid by plaintiff's assignor in this case was $107. The costs in the lower court were $148. The costs in this court will perhaps reach the sum of $200.

ARGUMENT.

II.

The state court held that the decree in the Homestead suit was not a bar to the right of recovery in this action. The decision was based upon two grounds. First, That neither the defendant in error nor his assignor, the Dubuque & Sioux City Railroad company, was a party to said suit; and secondly, that the taxes paid by the said railroad company were not sued for in that action and were not mentioned or described in the pleadings therein.

The case at bar was decided upon the rulings made in the case of Goodnow vs. Stryker, 14 N. W. Rep. 345 and 17 N. W. Rep. 506. The original opinion in that case contained this language:

"The claim is that the taxes in question were actually covered by the adjudication in the case of the Iowa Homestead company against the Des Moines Navigation & Railroad company. In our opinion this claim cannot be sustained. The taxes in question were not only no part of the taxes sought to be recovered in that action, but they were not paid by the plaintiff in that action. They were paid by the Dubuque & Sioux City Railroad company, and neither it nor its assignee, the present plaintiff, was a party to that action. The defendant contends that the Dubuque & Sioux City Railroad company was substantially a party to that action because the plaintiff in the action claimed a part of the lands by deed of warranty from the Dubuque & Sioux City Railroad company and notified that company of the pending of the action. The effect however of such notification would be only to bind the Dubuque & Sioux City Railroad company by the adjudication in respect to title. In that the Dubuque & Sioux City Railroad company was interested by reason of its deed of warranty but had no interest in the taxes sought to be recovered. So far as the issue was concerned

involving a right of recovery for the taxes, it was in no possible sense a party. The adjudication in that case then does not operate as a bar in this."

In the opinion on rehearing, the court said:

"In our opinion the Dubuque & Sioux City Railroad company, the plaintiff's assignor, was in no sense a party to the action so far as the question of taxes is involved."

17 N. W. Report, 506.

That no federal question is raised by the record in this case is quite apparent. The rule in reference to such cases is very clearly stated by this court in

Dupasseur vs. Rathereau, 21 Wall. 134.

It is there declared that

"Where a state court refuses to give effect to the judgment of a court of the United States rendered *upon the point in dispute* and with jurisdiction of the case and *the parties*, a question is undoubtedly raised which under the act of 1867 may be brought to this court for decision."

Under this rule to give this court jurisdiction it must appear on the face of the record that the judgment pleaded in bar was upon the *same point* that is in issue in the second suit, and that the action in both instances is between the same parties or their privies.

The sole and only evidence relied upon to prove that the Dubuque & Sioux City Railroad company was a party to the Homestead suit, is the fact that the said railroad company became, before the commencement of that suit, the owner of a majority of the stock in the Homestead company, the fact that the Homestead company never paid a dollar of the expenses of that suit, and the additional fact that Jesup, the president of the railroad company, presumed that he had given directions as to the prosecution of said suit. It is on such frivolous grounds as the above that this suit is brought here to occupy the time of this court. The position of the counsel seems to be that the railroad company was a party because it owned a majority of the stock in the Homestead company. Now it certainly needs no argument to convince this court that the mere ownership of

stock in a corporation does not make the owner thereof a party to a suit brought by such corporation, nor does it make any difference whether the ownership is of a majority or minority of the stock. In such a case the rights or claims of individual shareholders are in no sense involved in the suit and cannot in any manner be affected by a judgment or decree rendered therein.

Curran vs. Arkansas 15 How. 309.

Montgomery County Bank vs. Marsh 7 N. Y. 485.

Nor can it be said that a federal question is raised. To illustrate, suppose the plaintiff in error, in this case had set up as a defense to this suit, the judgment rendered in the celebrated Dred Scott case, and claimed immunity from the claim of defendant in error, by reason thereof. The sole reply the defendant in error could make, would be that the issues are not the same, and that the railroad company was not a party to that suit. Under such circumstances would a decision against such immunity raise a federal question that would give the court jurisdiction. If so, then it is clear that a defendant in any suit whatever, can raise an issue that will enable him to bring his case to this court, and obtain such delay as he may desire. But such is clearly not the law. The conclusive reason would be that the defendant in error was in no sense a party to the Dred Scott suit and that the matters in issue in that case were not the same as in this. The state court in deciding these points would be deciding matters of general law, and not questions of a federal character. It is only when the state court refuses to give effect to a judgment of a court of the United States rendered upon the *point in dispute*, and with *jurisdiction of the parties*, that the federal court can take cognizance of the suit, and review the decision of the state court. In the case at bar, the railroad company, the assignor of defendant in error, was in no sense a party to the Homestead suit, neither was the right of said railroad company to recover the taxes paid by it in any manner made an issue therein.

II.

It is clear that the taxes sued for in this action were not mentioned or described in the petition in the Homestead suit. The sole and only allegation in said petition relating to the taxes, was as follows:

"The said plaintiffs have been in possession of the lands claimed by them, themselves, or their vendees in contract since 1861. *They have paid the taxes* thereon to the state of Iowa since, in all amounting to $80,000, and if their title has failed *they* are entitled to have *their* taxes refunded since 1861 by the holders of the legal title who has not paid them."

The Homestead company sought to recover the taxes which it had paid on the lands and no other This was the very language of its prayer, (Rec. 36.) The taxes paid by the railroad company constituted a claim in favor of that company, and not in favor of the Homestead company. It was not possible for the Homestead company to recover judgment on a claim owned and held by the railroad company. The construction of the pleading was a question of general law.

III.

The counsel for the plaintiff in error relies upon the case of Chicago vs. Rubbins 4 Wall. 657, and a number of other cases founded upon the same principle. These cases are applications of the familiar doctrine that, when a person is interested in a suit by being ultimately liable therein, and has notice of its pendency, he shall be bound by the judgment. But this doctrine has no bearing, either directly or indirectly, upon the question now before this court. We shall not consume the time of this court in examining cases so utterly irrelevant.

MOTION TO AFFIRM.

It is claimed by the plaintiff in error that the Homestead suit was prosecuted by the Dubuque & Sioux City Railroad company, for the benefit of the latter company, and that as a consequence, the railroad company is estopped by the decree in that suit to the same extent it would have been if it had been a party on the record. The truth is, the railroad company was not only not a party to that suit, it in fact, had no interest whatever in its result, except as to the title to the lands. The railroad company having sold and conveyed the lands to the Homestead Co'y by deed of general warranty, and having received notice of the pending of the suit was bound by the decree therein, so far as it concerned the title to said lands, but in no other respect. To this extent it was bound by the covenant of warranty and by nothing else. But this covenant had nothing to do with the taxes paid by said company. It is clear therefore, that the rail-

road company was in no sense a party to the Homestead suit, so far as the taxes were concerned.

It is equally clear that the taxes sued for in this action were not sued for in the Homestead suit; they were not mentioned, described, or referred to in the pleadings in that case. The taxes sought to be recovered in *that* case were taxes *paid by the Homestead company* and constituted a claim or demand in behalf of that company, while the taxes sued for in *this* action are the taxes *paid by the Dubuque & Sioux City Railroad company*, and constitute a claim or demand in behalf of said railroad company.

To illustrate, suppose the plaintiff in error had given the Homestead company a promissory note for the amount of taxes paid by that company, and also a promissory note to the railroad company for the amount of taxes paid by it. In an action on the former note it would not be possible for a court of justice to adjudicate the rights of the railroad company under the note held by it. The claims are distinct and separate and held by different parties. The same thing is true as to the implied promises involved in this action and in the Homestead suit.

Again if the court in the Homestead suit had held the taxes, recoverable, evidence of the payment of taxes by the Dubuque & Sioux City Railroad company would not have been relevant or competent under the pleadings as they stood in said suit. The pleadings mentioned *only* the taxes *paid* by the Homestead company and not the taxes paid by the railroad company. Evidence as to the payment of taxes by the railroad company or by any other stockholder in the Homestead company would have been irrelevant. In short the taxes claimed in this action could not possibly have been recovered in the Homestead suit under the pleadings as they stood. Of course if the railroad company could not have obtained a judgment in its favor if the decision had been the other way it certainly cannot be prejudiced by the decree or judgment rendered therein.

Should the court conclude to overrule the motion to dismiss the writ of error, we insist that for the reasons above stated the decree of the state court ought to be affirmed.

GEORGE CRANE,
Attorney for Defendant in Error.

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APR 6 1885
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ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

IN THE

Supreme Court of the United States.

R. B. CHAPMAN, PLAINTIFF IN ERROR,

vs.

EDWARD K. GOODNOW, DEFENDANT IN ERROR.

ON ERROR FROM SUPREME COURT OF IOWA.

C. H. GATCH, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

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On Error from Supreme Court of Iowa.

C. H. GATCH, *for Plaintiff in Error.*

GEO. CRANE, *for Defendant in Error.*

ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

STATEMENT.

At the October term, 1868, of the district court of Webster county, Iowa, the Iowa Homestead Company, assignor of defendant in error, an Iowa corporation, commenced a suit against the Des Moines Navigation and Railroad Company, another Iowa corporation, and numerous grantees of the latter, including plaintiff in error, to establish title in said homestead company to the so-called "Des Moines river lands," and with a view to alternative relief, in the event of an adverse decree on the question of title, made the following allegation in its petition:

> The said plaintiffs have been in possession of the lands claimed by them, themselves or their grantors in contract, *since 1861*. They have paid the taxes thereon to the state of Iowa *since*, in all amounting to eighty thousand dollars, and if their title has failed, they are entitled to have their taxes refunded *since 1861*, by the holder of the legal title who has not paid them. Record, p. 35.

And prayed—

That in the event of a decree that the plaintiff's present title or any part of it has failed, the said Des Moines Navigation and Railroad Company and its assigns may be decreed to repay the plaintiff all the taxes which he has paid on said land and interest thereon. Record, p. 36.

The answer to this part of the petition is as follows:

As to whether or not the said complainant and its vendees have been in possession of and paid said taxes on the lands claimed by them since 1861, to the amount of $80,000, this defendant is ignorant and uninformed save by the said complainant's said bill of complaint, but expressly avers that the possession of the said lands by the said complainant and its vendees since 1861, is and has been unauthorized and wrongful, * * * and avers that all taxes whatever paid by said complainant have been paid by complainant voluntarily, with a knowledge of all the facts, and that the complainant is not entitled to have the same or any part thereof refunded. Record, p. 38.

The petition also contained the following allegation:

The said navigation company conveyed certain parcels of the land now claimed by plaintiff to the following persons, among others: Samuel G. Wolcott, Wm. B. Wells, Roswell S Burrows, Edwin C. Litchfield, W. J. McAlpine, *Richard B. Chapman*, Albert Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade and John Stryker.

The suit was commenced in the district court of Webster county, Iowa, and was thence transferred to the circuit court of the United States for Iowa. At the final hearing in the circuit court the petition was dismissed. On appeal to this court the decision below was affirmed, and the right to recover the taxes paid was denied.

On the question of complainant's right to the alternative relief claimed, this court say in *Homestead Company vs. Valley Railroad*, 17 Wall., p. 167:

It is true, in accordance with our decision, that the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the

appellants, owing to their too great confidence in their title have risked too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily paid refunded by the successful party in this suit.

That this adjudication was properly plead in this case as a defense is conceded.

In the two cases of the *Dubuque & Sioux City Railroad Co. vs. the Supervisors of Webster county, Iowa*, and *Iowa Homestead Co. vs. same*, 40 Iowa, 16, the question was, as to the right of recovery of these identical taxes, by the assignor of defendant in error, from Webster county, and it was held that such recovery could not be had, for the reason stated in the following extracts from the opinion:

> The payments having been made *voluntarily*, with knowledge of all the facts, believing that under the law, the lands belonged to the plaintiffs; the mistake was one of law, and no action at the common law or in equity lies to recover the money thus paid. Page 17.
>
> This section—referring to section 762 of the Revision—does not contemplate an error of judgment as to the law respecting the title of the land committed by the tax payer. It was not intended to protect him against errors or mistakes of law committed by himself. The simple claim is, that the plaintiffs paid the taxes voluntarily with full knowledge of all the facts upon which they based their claims of ownership of the lands, believing and insisting that they were the owners therof in fee simple; but that it was afterwards decided by a competent court that they had no title thereto. Page 18.

It will thus be seen that the sole ground upon which the right of recovery was denied, was, that the payment of the taxes had been voluntary.

In *Garrigan vs. Knight*, 47 Iowa, 525, it was held that—

> When the title to real estate is in controversy, and the taxes thereon are voluntarily paid by one of the parties to the controversy, whose claim is afterwards adjudged to be invalid, he cannot recover the amount so paid from the owner.

The decision in this case has never been overruled otherwise than by being in conflict with later decisions in the numerous "Goodnow cases," of which the case at bar is one.

In the first of these, the case of *Goodnow vs. Moulton*, 51 Ia., 555, prosecuted by Goodnow as assignee of the Homestead company for the recovery of part of these same taxes, the defense of voluntary payment having been relied upon, and the case of *Homestead Company vs. Valley Railroad*, having been cited as authority, the Supreme Court of Iowa, very strangely overlooking the above quoted paragraph of the opinion in that case say, in their opinion, page 560:

> We have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show, with any degree of certainty, that the right of the plaintiff to recover the taxes paid was in the case.

And more strangely still, in the subsequent case of *Goodnow vs. Stryker*, 14 N. W. Reporter, 345, now also pending here on a motion similar to this, after having discovered the oversight in the Moulton case, it is said:

> Since the decisions in *Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company*.

The question of voluntary payment having been thus disposed of, it became necessary in the Stryker case to dispose of the further defense relied on, that the claim was barred by the New York statute of limitations, and this involved the real and decisive question, *when* and *how* did the cause of action accrue, which the opinion thus discusses and determines.

> We do not think a cause of action accrued upon each payment at the time it was made, nor upon all at the time the last one was made. The implied promise upon which the action is based, arose by reason of the circumstances. See *Goodnow vs. Moulton*, above cited. One very important circumstance was that the title was involved in serious litigation which was not terminated in the defendant's favor *until 1873*. We do not think the defendant's implied promise could be regarded as absolute. He certainly never promised to pay these taxes in case the title should be adjudicated to be in the Iowa Homestead Company, and no one had any reason to suppose he intended to incur any such liability. The most that can be said then in regard to the defendant's implied promise is, that it was based upon a contingency, and being so, it was not enforcible until the con-

tingency had happened. We think that the cause of action did not arise until the termination of the litigation by which the title was adjudged to be in the defendant.

Plaintiff in error accepting this as settling the proposition that a cause of action accrued to the Homestead Company by "the termination of the litigation by which the title was adjudicated to be in the defendant," the Des Moines Navigation & Railroad Company, plead as one of its defenses in this case, the New York statute of limitations, of which state plaintiff in error was a citizen, relying on the decision of this court in the cases of *Wolcott vs. The Des Moines Company*, and *The Des Moines Company vs. Burr*, 5 Wall., 681 and 689, decided *in 1866*, as being *such termination of that litigation*. For answer, setting up this defense, see record, page 9—and for the evidence showing the intervention of the Homestead Company in the two last named cases, see record, pp. 56–86.

Defendant in error in his original petition based his claim upon an assumed implied promise resulting from the payment of the taxes by his assignor, the Iowa Homestead Company, as they from year to year became due, under claim and belief of ownership by it of the lands on which they were paid.

Webster county by some means becoming or assuming to be a party to the suit, filed a pleading in which it alleged that Chapman had never paid the taxes, and that they were due from him to the county. Chapman, by his answer to Goodnow's petition, made general denial, and, among other defenses, plead the Iowa and New York statutes of limitation, former adjudication, and the *voluntary* payment of the taxes by Goodnow's assignor. His answer to the pleading of the county, contained the following as paragraph three:

PAR. 3. Said defendant, further answering, says that all of said taxes mentioned in said petition were duly paid by said Iowa Homestead Company as soon as the same became due, and said defendant is no longer liable therefor.

There was no allegation of any *new* promise, express or implied, in any pleading filed either by Goodnow or Webster

county, and the only reply by Goodnow to the plea of former adjudication was, that the judgment was void because the "courts of the United States had no jurisdiction of the suit" in which the adjudication was had; in addition to which he had the benefit of a denial by force of the Iowa statute.

Upon this state of the record, the Supreme Court of Iowa, 21 N. W. Rep., 103, disposed of the case as follows:

> The facts of the case and questions of law involved are the same as those in *Goodnow vs. Litchfield*, 19 N. W. Rep., 226; *Iowa Homestead Company vs. Des Moines Navigation and Railway Company*, *Id.*, 231; *Goodnow vs. Stryker*, 16 N. W. Rep., 486; S. C., 17 N. W. Rep., 506. *Some confusion and difficulty have resulted from submitting this case with others, and a failure to point out the distinction in the several cases.* * * * *
> Following the *cases* above mentioned the decree of the circuit court is reversed.

From which it will be seen that counsel for defendant in error in his assumed quotation of the language in which the court disposed of the case—page 6 of his brief, is—no doubt, unintentionally— misleading, in limiting the reference by the court to the *single* case of *Goodnow vs. Stryker*, 16 N. W. Rep., 486, from the opinion in which he proceeds to copy a lengthy extract.

The following is the certificate which, together with the foregoing and the copy of the decree of the Supreme Court of Iowa, will constitute a sufficient statement of the case and will show how the questions to be made in argument have become vital in this case by reason of the previous decisions of the Supreme Court of Iowa in other similar cases, and why plaintiff in error is not unreasonably desirous of having his rights adjudicated in this court, if there is any ground on which he has the right to prosecute his writ of error here.

CERTIFICATE.

> And now, on the application of the defendant R. B. Chapman, it is certified by the court here, and ordered to be made part of the record herein, that by the answer of the defendant, and in defendant's assignment of errors, and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of plaintiff, on the ground that as he

claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Iowa Homestead Company, by the Supreme Court of the United States, in the case of *The Iowa Homestead Company vs. The Des Moines Navigation & Railroad Company*, and this defendant and others, at the October term thereof, A. D. 1872, *and that our decision herein was and is against the immunity so claimed by defendant herein.*

And it is further certified and ordered to be made a part of the record herein that by defendant's answer, and on the hearing in said cause defendant claimed immunity from said entire claim and demand, because, as was claimed and alleged, the alleged cause of action not having accrued within six years immediately preceding the commencement of this action, was barred by the statute of limitations of the state of New York, and that to determine whether or not it was so barred, it became material and necessary to decide whether or not the decision of the Supreme Court of the United States in the case of *Samuel G. Wolcott vs. The Des Moines Navigation & Railroad Company*, reported in 5 Howard, 681, was a final determination of the question of title therein decided, in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed *because of said decision that said determination was not final.*

DECREE.

This cause coming on to be heard the 24th of October, 1884, the plaintiff appearing by George Crane, his attorney, the defendant appearing by Theo. Hawley, his attorney, and the court having duly considered the issues, the evidence, and arguments of counsel, finds the issues in favor of the plaintiff

It is therefore ordered, adjudged and decreed that the plaintiff, Edward K. Goodnow, have and recover of and from the defendant, R. B. Chapman, the sum of twelve hundred and eighty-seven dollars and forty cents, and interest thereon at six per cent. per annum from the 13th day of March, A. D. 1883, and costs of suit taxed at one hundred and forty dollars, and the decree be and is hereby made a special lien on the following described lands (describing them).

ARGUMENT.

The record presents two federal questions, either decided or the decision of which was necessary to the decree rendered by the Supreme Court of Iowa.

First. — Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, *under the decision and judgment of this court* in the case of *Homestead Com-*

pany vs. Valley Railroad, 17 Wall., 153, the controversy therein having been, as plaintiff in error claims, and, as is alleged in his answer, between the same parties, and upon the same issue, and for the same demand, and the decision and judgment therein having been against the validity of such demand.

Second.—The plaintiff in error claimed immunity from the demand of the defendant in error, because *by force and virtue of the decision of this court* in the case of *Wolcott vs. Des Moines Co.*, 5 Wall., 681, and the *Des Moines Co. vs. Burr, Id.*, 689, the cause of action accrued, if ever, at the date of said decision, and was, therefore, at the commencement of this suit, barred by the statute of limitations of the state of New York.

The decision of this question, and the necessity therefor, by the Supreme Court of Iowa, are thus stated in the certificate:

> To determine whether or not it was so barred, it became neccessary to decide whether or not the decision of the Supreme Court of the United States in the case of *Samuel G. Wolcott against the Des Moines Navigation and Railroad Company was a final determination of the question therein decided.* * * * And our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed *because of our said decision that said determination was not final.*

I.

It is not denied that the plea of former adjudication was a claim of immunity under an authority exercised under the United States, and raised a federal question, but it is insisted that the decision was not a decision against the immunity so claimed, and that such a decision was not necessary to the decree rendered for the reason that, as is maintained, there was another issue in the case upon which the decision might be and was made and upon which the decree can be maintained regardless of the federal question.

Whether or not this position is maintainable involves the question: *First*—Whether or not the decision was in fact against the immunity claimed; and, if not, then, *Second*—whether or not such a decision was "necessary to the judgment or decree

rendered in the case;" or, in other words, whether or not there was any other question in the case rendering the decision of that question unnecessary.

First.—Was it so decided?

There having been no opinion filed, and there having been "*some confusion*" resulting "*from submitting this case with others, and a failure to point out the distinction in the several cases,*" the question decided can only be ascertained by knowing *what issues were made by the pleadings and properly before the court for decision.*

Notwithstanding the present rule of this court, that it will in a proper case examine the opinion of the state court to ascertain what was in fact decided, the rule will hardly be so extended as to require or admit of the examination of *numerous opinions in other cases* to which the state court has, as in this case, simply made reference; and it will certainly not be presumed that the Supreme Court of Iowa, because it decided one case on an assumed implied promise made after the suit was commenced and not in issue in the case, did the same thing in another case in which it has not said that it did.

But assuming that the court will do so, and in doing so will select one of the opinions only, and that one the opinion selected and copied by counsel for defendant in error in his brief; still it is respectfully maintained that it is not sufficiently made to appear that the state court did not decide against the immunity claimed by the plaintiff in error under the former adjudication.

That opinion very clearly indicates that the decision in the case involved the question, whether or not the act of claiming the benefit, as consideration for an implied promise, *after* the adjudication, of the payments made *before* the adjudication, and which were thereby adjudged to have been *voluntary* payments, and for that reason not recoverable, could on some principle of relation and ratification be made to obviate the effect of the adjudication. In other words, whether or not the ingeniously

contrived new implied promise could be supported by a consideration that had already been adjudged insufficient to create a liability.

The following is the language of the opinion referred to:

> The case before us is peculiar. The act done was such that it necessarily inured to the defendant's sole benefit. Besides, the circumstances under which the act was done, should not be overlooked. The defendant neglected the payment of the taxes, which was a duty of public concern. He allowed the plaintiff's assignor, under an honest claim of title to the land, to discharge this duty for several years in succession. Now, while the plaintiff is not allowed, by reason of prior adjudication, to set up these facts *as alone sufficient to create a liability on the part of defendant*, they may be considered, we think, *in connection with the fact that the defendant has since claimed the benefit of the payments* as sufficient to render such claim of benefit, a ratification, if it otherwise would not be.

What the Supreme Court of Iowa must necessarily have considered and passed upon was, whether or not the assumed moral obligation was sufficient consideration to raise and support an implied promise to pay an assumed debt, not only barred by the statute of limitations, but that had been already adjudged by this court *not to be a debt*; and in doing so it necessarily decided against the immunity claimed under the prior adjudication, by holding the new promise to have deprived that adjudication of its "force and effect."

That such was the view of the state court is further made evident by its certificate which, as to this question, concludes with the words, "our *decision* herein *was and is against the immunity so claimed* by defendant." It is difficult to see why, in the absence of an opinion in the case, this explicit statement by the court should not be taken as conclusive, at least for all the purposes of the pending motion.

Second.—Was there any other question upon which the case might have been decided, as it was decided, without regard to the federal question? The only question or ground upon which it is claimed that it might have been, and in fact was so decided, is that of the alleged new promise.

As already shown this, had it really been an issue in the

case, was so related to the question of former adjudication as necessarily to involve the latter question in the decision. *But that issue was not in the case.* The so called new promise was made *after the commencement of the action*, and was not plead by Goodnow, either by way of amendment of his petition or in his reply, *or in any pleading in the case.* The court having made the discovery kindly sought to give him the benefit of it, accompanied with an apparent reflection upon defendant's counsel in the suggestion, "whether the action was *premature* is a different question, *and one not raised.*" *How could it have been raised upon the pleadings or any issue in the case?*

The court, quite unwarrantably in the first paragraph of the opinion, assumes that a *new* implied promise was plead by Goodnow in reply to the plea of former adjudication, using this language:

> The defendant pleaded as one of its additional defenses that the plaintiff's right of recovery is barred by a prior adjudication, to-wit: An adjudication in the case of the *Iowa Homestead Company vs. Des Moines Navigation and Railroad Company*, reported in 17 Wall., 153. To this plea the plaintiff replies, in substance, that if it should be conceded that the court made an adjudication in that case denying a right of recovery for the taxes in question in this case, yet this action is not barred because a right of recovery has arisen since that time. The fact relied upon as giving such right of recovery is that the defendant now claims, as he did not then, the benefit of the payments made by the homestead company.

The fact is, as can be seen by reference to the record of that case now pending in this court, pages 1 to 9, that plaintiff did nothing of the kind. *There is not a line or syllable anywhere in the record showing that any such reply or the semblance of it was filed.*

Suppose in a case in which a federal question is clearly and properly presented for decision and there is no other question in the case rendering its decision unnecessary, the state court should, through oversight or for any other reason, say: "The question not being necessarily before us for decision we do not decide it." Will a party thus denied the immunity he claims be thereby deprived of right to come for redress to this court?

If not, let it be further supposed that the state court is *mistaken* in assuming that there is another question, not federal, rendering the decision of a question conceded to be such, unnecessary, is this court to be affected in its jurisdiction by the mistake of the state court, or must it determine the question of its jurisdiction on its own understanding of the record?

But it is claimed that the defense of former adjudication must, in any event, have failed, because, as is maintained, the decree in the former suit was void for want of jurisdiction in the United States Circuit and Supreme Courts to render it.

It will not be denied that the question whether or not it was void for that or any other reason, is a question properly determinable by this court on error, as a federal question, and it must necessarily follow that, if put on that ground alone, a motion to dismiss *for want of jurisdiction*, must be overruled. But the objection is untenable.

The homestead company, plaintiff in that suit, being an *Iowa* corporation, and plaintiff in error, then as now, a citizen of the state of *New York*, was jurisdiction, *as to them*, defeated by the fact that the navigation company, a co-defendant in the suit, was also an *Iowa* corporation?

It appears from the original notice (Rec., pp. 14, 15) that the suit was commenced in October, 1868, while, it will be observed, the removal act of July 27, 1866, was in force.

That act provided, that whenever a suit should be commenced by a citizen of one state "*against a citizen of the same and a citizen of another state*" in which there was a controversy which could be finally determined as between the plaintiff and the non-resident defendant, without the presence of the other defendant or defendants, the same might, as to such non-resident defendant, be removed, without prejudice to the right of the plaintiff to proceed in the state court as against the other defendant or defendants.

Enough of the record in the former suit appears in the

abstract in this to show that the citizenship of the parties and the nature of the controversy were such that the suit was clearly removable under the act referred to.

The suit was prosecuted by the homestead company, an *Iowa* corporation, against the Des Moines Navigation & Railroad Company, also an *Iowa* corporation, and other defendants, including plaintiff in error, all of whom were citizens of the state of *New York*.

The controversy was with respect to certain lands claimed by the navigation company and the other defendants as its grantees under the grant known as the "Des Moines River Land Grant;" and alternatively, with respect to taxes which the homestead company claimed to have paid on the same lands under claim of title thereto. The claims of the different defendants to the lands were *several*, each claiming to be the owner of distinct parcels, plaintiff in error and each of the other non-resident defendants claiming as grantees by separate grants from the navigation company.

The homestead company asked, in the event of the question of title being adjudged against it, to be reimbursed the amounts of taxes paid by it on the lands, as money paid for the use of the respective owners thereof.

That the interests of the various defendants in the subject matter of the controversy were not *joint*, but *distinct and several* sufficiently appears from the allegations of the petition; among others, the allegation that the non-resident co-defendants of the navigation company were its grantees of separate parcels of the lands in controversy in the suit. But it is not necessary, for any purpose of the question under discussion, that it should appear from the record that such was the fact. The contrary not appearing, it is enough, the judgment being attacked collaterally, that their interests *might have been* several. The necessary jurisdictional facts under such circumstances will be presumed.

It will be seen, by referring to page 36 of the record, that

after the suit in question was removed into the circuit court the plaintiff, *by leave of the court and agreement of counsel*, filed an amendment to its bill entitled as are all other pleadings in that court. While it is conceded that neither consent nor acquiescence can confer jurisdiction in a case in which the court is incapable of exercising it, it by no means follows that, when a controversy separable, both as to subject matter and the parties thereto, is such that a court is capable of taking and exercising jurisdiction over it, the parties and subject matter being—no matter how irregularly, if as to the parties, *voluntarily*—before it, a judgment rendered therein would be void.

In Dillon on Removal of Causes, 2d Ed., page 3, quoting Mr. Justice NELSON, it is said of the jurisdiction in removal cases, that it is—

Original jurisdiction acquired indirectly by a removal from the state court.

Suppose a suit commenced, in the first instance, in the United States circuit court by A. against B. and C., the owners respectively of separate parcels of land claimed by them under conveyances from a *common grantor*, D., to establish title to both parcels in A.; or, failing in that, to recover of B. and C., taxes previously paid by A. on the parcels of land claimed by them respectively; and further that A. and B. are citizens of the state in which the suit is brought and C. a citizen of another state, and the court is permitted to take and exercise jurisdiction without objection by any of the parties, would it be pretended that a judgment rendered in such a case would be an absolute nullity as between A., the resident plaintiff, and C., the non-resident defendant?

Cameron vs. McRoberts, 3 Wheaton, 592, was a suit brought in the district court of Kentucky—said court having then the jurisdiction by law of a circuit court—by McRoberts, a citizen of *Kentucky*, against Jackson and Emerson, also citizens of *Kentucky*, and Cameron, a citizen of *Virginia*.

Cameron was not served with process but appeared and answered the bill as did the other defendants. A final decree having been pronounced in favor of McRoberts, Cameron filed a bill of review, and moved the court to set aside the decree and dismiss the suit—

> Because the *want of jurisdiction appeared of record*, and upon the allegation that the said Jackson and Emerson and the other parties to the bill, were in fact citizens of the state of *Kentucky*.

One of the questions made by the motion was:

> Had the district court jurisdiction of the cause as to the defendant, Cameron, and the other defendants? If not, had the court jurisdiction as to the defendant Cameron alone?

The judges being divided in opinion, this, with other questions, was certified to the Supreme Court. The Supreme Court decided the question stated as follows:

> If a *joint* interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a *distinct* interest vested in Cameron so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction might be exercised as to him alone.

Why might the jurisdiction in that event be "exercised as to him alone?" Manifestly because as between him and the plaintiff, McRoberts, the citizenship requisite to confer jurisdiction existing, the suit was not *coram non judice*, and hence void. It is wholly immaterial as to how, in that case, the fact appeared that the citizenship of part of the defendants was the same as that of plaintiff, whether from averments contained in the pleadings, or by extrinsic proof, since the fact *did* appear and the decision of the court assuming its existence, held that jurisdiction of the defendant, Cameron, *was not thereby defeated.*

The question, in the view we are now considering it, is not whether the suit in which the adjudication herein in question was made, was properly removable from the state to the federal court, but whether or not, assuming it to have been improperly removed, the parties, as between whom, had they not been improperly joined with others, it is conceded the latter

court could have taken and exercised jurisdiction, might not waive objection and voluntarily submit themselves to its jurisdiction. *Strawbridge vs Curtis*, 3 Cranch., 367, a case cited and much relied upon by counsel for appellants, instead of being in conflict with the foregoing case, tends rather to support it. In the opinion it is said:

> Where *the interest is joint*, each of the parties concerned in that interest must be competent to sue or liable to be sued in these courts. But the court does not mean to give an opinion in the case where several parties representing *several distinct interests*, and some of the parties are and others are not competent to sue or liable to be sued in the courts of the United States.

The subsequent case of *Cameron vs. McRoberts*, *supra*, having decided the question, thus left an open one, and that case having never been overruled or questioned, it is relied upon as decisive of the question as now made in this case.

II.

Remembering that by the terms of the act of congress the right to the writ of error exists whenever an "immunity is claimed under authority exercised under the United States and the decision is against the immunity claimed;" and that in the language of the opinion of this court in *Murdoch vs. City of Memphis*, 20 Wall., on page 632: "It was no doubt the purpose of congress to secure to every litigant whose rights depended *on any question of federal law*, that that question should be decided for him by the highest federal tribunal"—in the contingency of an adverse decision by the state court—it seems plain enough that this case, on the remaining question, comes within both the terms and purpose of the law. Certain it is that the claim of immunity under the defense of the statute of limitations depended as absolutely on the effect to be given to the former decision of this court in the Wolcott and Burr cases, as did or could that made under the defense of former adjudication in the Homestead company case; and it is equally certain

that, had the state court given to the decision in the Wolcott case the effect claimed for it by the plaintiff in error, the result would have been the immunity claimed.

The question upon which, in the Stryker case, referred to in the statement, the defense of the statute of limitations turned, was, whether the cause of action accrued at the dates of the respective payments of the taxes, or when the question of title was finally determined by the decision of this court as between the claimants respectively, under the so-called river land and railroad grants, and, if at the date of the final decision of that question, whether or not the decision in the cases of Wolcott and Burr, 5 Wall., *supra*, was such final determination. How the question assumed that form is shown by the extract from the opinion in the case, copied into the statement.

The court having thus in effect made the question of defendant's liability to depend upon the time of "the termination of the litigation by which the title was adjudicated to be in defendant," the ultimate and precise question as shown by the certificate, as above quoted, upon which the case and defendant's liability turned was, whether or not the decision of this court in the cases of Wolcott and Burr was a final adjudication of the question of title therein passed upon; in other words, *upon the effect to be given to a decision of this court.* While, in terms and immediately, immunity was claimed under the statute of limitations, yet the ultimate and essential ground upon which the claim must be allowed, if at all, was that, according to the true interpretation and effect of the decision in the cases just named, a cause of action thereby and of that date accrued to the defendant in error.

Can it make any difference how the question of immunity comes to depend on a question of federal law, provided only that it comes legitimately before the court, and does necessarily so depend?

Plaintiff in error maintained that the decision in these cases was final, while the court held that the question was not finally

decided until 1873, meaning in the cases of *Williams vs. Baker*, 17 Wall., 144, and *Homestead Company vs. Valley Railroad*, *Id.*, 153, and, so holding, necessarily held that the action was not barred. From the contrary holding it would have as necessarily followed that the action was barred. There was no question requiring a construction in any respect of the New York statute of limitations, nor was its application to the case dependent upon any controverted fact proposition. The real and only question, therefore, was, whether or not the decision of this court in the Wolcott and Burr cases was *final* in such sense as that, according to the rule or doctrine laid down by the Supreme Court of Iowa, a cause of action then accrued. That decision was made in cases to which, by intervention, the assignor of defendant in error was a party, as will be seen by reference to the record, pages 56–86. That the homestead company must be treated as having been a party to the Wolcott and Burr cases for the purposes of this question, is further evident from the following taken from the opinion of this court in *Williams vs. Baker*, 17 Wall., 144, referring to a complaint of collusion between the parties in the Wolcott and Burr cases, and the claim that for that reason it should not be treated as an authoritative adjudication. On pages 150–2, the court says:

> We must be permitted to question both the taste and legal competency of testimony offered in an inferior court to show that a decision in this court was obtained by fraudulent devices, *when that decision is not relied on as evidence of any fact or pleaded as an estoppel, but merely because it may be referred to as settling a principle of law applicable to the case at bar.*
>
> There is in the record of that case, as it remains in this court, sufficient answer to this objection to the opinion *as an authority on the law in this case*. The writer of this opinion, though then a member of the court, declined to take any part in its decision because he had been of counsel for the navigation company in a general way, and did not know how far he might have been engaged in that case. But when it was submitted on printed arguments on both sides he saw at once that the legal propositions involved did affect materially the title of several railroad companies in Iowa to the lands in question, and he felt it to be his duty to call the attention of those of his brethren who must decide the case to that fact. On this suggestion an order was made that those companies be notified of the

pendency of that suit, with liberty to intervene and be heard on the question in which they were interested. They did intervene, the case was postponed for over a year, and several arguments were submitted in favor of the railroad companies by able counsel *on the very question now under consideration*, and an order was made inviting all parties interested to do so. It was after a full consideration of all these arguments that the decision was made. But there was an additional security that the court would carefully consider the question, in the fact that there was submitted at the same time the case of *Burr vs. The Des Moines Navigation & Railroad Company*, on a similar warranty of title. Now, though both suits were decided in the circuit court for the southern district of New York, they were decided by different judges, and the decisions were in conflict. This of itself would demand of the court a careful consideration of the point of difference which was the very point now under consideration. * * *

Whatever, therefore, may have been the design of the original parties to the suit of *Wolcott vs. The Des Moines Company*, it is clear that the question here involved was argued fully by parties deeply interested on both sides, and received the attentive consideration of the court, and as an authoritative exposition of its views is entitled to the same weight as other well considered cases.

The Wolcott-Burr decision has repeatedly been reaffirmed, and the court in *Homestead Company vs. Valley Railroad*, 17 Wall., on page 162, thus refers to it:

> The main question involved in this case is the question of the title to the Des Moines river lands, which was settled several years ago by the decision in the cases of Wolcott and Burr and in the subsequent unreported case of *Riley vs. Wells*, adversely to the titles set up by the appellants. At the present term of this court the principles involved in these decisions have been reconsidered and reaffirmed.

The question here is, whether the decision of the state court is final upon the question whether or not the decision in the Wolcott and Burr cases was such determination of the question of title as that a cause of action then accrued, or whether, being a question as to the proper interpretation and effect of a decision of this court, it is a "federal question" within the meaning of the act of congress.

It is respectfully submitted that upon this point the case is within the principle of the following decisions of this court:

Dupasseur vs. Rochereau, 21 Wall., 130, in which on error to the Supreme Court of Louisiana, this court took and exercised jurisdiction to determine whether or not, upon a question of the order of priority of liens, the decree of the state court foreclosing a mortgage, accorded due force and effect to a decree previously rendered in the United States circuit court for that state foreclosing another mortgage on the same premises; and *Embry vs. Palmer*, 2 Supreme Court Reporter, 25, in which it was held that this court might, on error, review the judgment of the Supreme Court of Connecticut enjoining the collection of a judgment rendered by the Supreme Court of the District of Columbia.

The decree of the federal court—which it was claimed in the first named case had not been given its due legal effect—it will be observed, was rendered in a case to which Rochereau, against whom the question was made, was not a party. Yet this court took jurisdiction and affirmed the decision of the state court *because it had given due effect to the decision of the federal court.* The state court could not have certified more certainly than it has in the case at bar that its decision was against the immunity claimed *because of the limited effect allowed by it to the Wolcott decision.* Suppose the defense of the statute of limitations, the case in all other respects being the same, had, instead of turning upon a decision of this court, turned upon the meaning and effect to be given to an Act of Congress, would the question in legal effect have been different? And yet is it not clear that it would have been a federal question?

While in terms the certificate states the question to have been whether or not the decision in the Wolcott case was a *final* decision of the question of title, it is obvious that it could only have been, whether or not upon the theory of that court as to the nature of the implied promise and the condition upon which a suit could be brought, it was such a decision of the question as gave to the defendant in error an immediate right of action upon it.

The defendant in error having been a party in such sense and manner as to be concluded by the adjudication, the decision was necessarily final, unless and until in some manner reviewed and set aside by this court, of which having been done there is no pretense. The Supreme Court of Iowa must therefore necessarily have held that the question of title was not one of the questions decided in the Wolcott and Burr cases, as otherwise it must necessarily have held a cause of action to have then accrued and to have been barred long before the commencement of this suit. The question therefore in reality was, whether or not the question of title was decided, and not as to its being or not being final. How long must the defendant in error have waited to find out whether or not the decision was final and give it a right of action? was it to wait until the commencement of another action, and if such action had never been commenced would the decision have never become final?

The claim that the New York statute of limitations ceased in 1870 to have effect as to causes of action already accrued but not yet fully barred, is not sustained by the cases cited in its support. The act amendatory of the Iowa statute of limitations, enacted in that year, by fair construction can only apply to causes of action *thereafter* accruing. The language is: "But this section shall not apply to causes of action *arising* within this state."

The case of *Goodnow vs. Stryker*, 14 N. W. Rep., p. 347, is clearly not in point, for the reason that the question was not in the case, as the cause of action involved was held not to have accrued until 1873. The other case cited, *Higgins vs. Mendenhall*, 42 Iowa, p. 675, seems to have no relevancy whatever to the question.

C. H. GATCH,
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P. C. KENYON, LAW BRIEF PUBLISHER.

FILED
APR 11 1885
JAMES H. McKENNEY
CLERK

ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

IN THE

Supreme Court of the United States.

R. B. CHAPMAN, PLAINTIFF IN ERROR,

vs.

EDWARD K. GOODNOW, DEFENDANT IN ERROR.

ON ERROR FROM SUPREME COURT OF IOWA.

C. H. GATCH, FOR PLAINTIFF IN ERROR.
GEO. CRANE, FOR DEFENDANT IN ERROR.

P. C. Kenyon, Publisher Law Briefs, Des Moines.

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C. H. GATCH, *for Plaintiff in Error.*

GEO. CRANE, *for Defendant in Error.*

ARGUMENT IN RESISTANCE OF MOTION TO QUASH WRIT OF ERROR.

STATEMENT.

At the October term, 1868, of the district court of Webster county, Iowa, the Iowa Homestead Company, assignor of defendant in error, an Iowa corporation, commenced a suit against the Des Moines Navigation and Railroad Company, another Iowa corporation, and numerous grantees of the latter, including plaintiff in error, to establish title in said homestead company to the so-called "Des Moines river lands," and praying that in the event of an adverse decree on the question of title, the navigation company and its assigns be decreed to repay all the taxes, amounting to $85,000, that had been paid on the lands *since 1861.*

This suit, commenced as already stated, in the district court of Webster county, was removed to the circuit court of the United States for the district of Iowa. On the hearing, the

circuit court dismissed the bill, and on appeal to this court the decree of dismissal was approved.

On the question of complainant's right to the alternative relief claimed, this court say:

> It is true, in accordance with our decision, that the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title have risked too much, it is their misfortune; but they are not, on that account, entitled to have the taxes voluntarily paid refunded by the successful party in this suit.

That this adjudication was properly plead in this case as a defense, is conceded.

The identical taxes claimed in the case at bar were claimed in the former suit, and *in the very terms* in which those for the subsequent years were claimed, as to which latter the Supreme Court of Iowa has already held in *Goodnow vs. Litchfield*, 59 Iowa, 226, that they were included in that suit and covered by the adjudication therein. They were *part*, as were those involved in the last named case, of the $80,000 of taxes, the claim for which was thus stated in the petition in the former suit: "The said plaintiffs have been in possession of the lands claimed by them, themselves or their grantees in contract, *since 1861*. They have paid the taxes thereon to the state of Iowa *since*, in all amounting to eighty thousand dollars, and if their title has failed they are entitled to have their taxes refunded *since 1861*, by the holder of the legal title who has not paid them."

The prayer was, that in case plaintiff should be adjudged not to be the owner of the land, that the Des Moines Navigation & Railroad Company and its assigns, be decreed to repay *all taxes* paid by the plaintiff *on the lands*, with interest.

The answer to this part of the petition pleads ignorance "as

to whether or not the complainant and its vendees have been in possession of and paid the taxes claimed by them *since 1861*" (Abs., pp. 25–6).

In the two cases of the *Dubuque & Sioux City Railroad Co. vs. the Supervisors of Webster county, Iowa*, and *Iowa Homestead Co. vs. same*, 40 Iowa, 16, the question was, as to the right of recovery of these identical taxes, by the assignor of defendant in error, from Webster county, and it was held that such recovery could not be had, for the reason stated in the following extracts from the opinion:

> The payments having been made *voluntarily*, with knowledge of all the facts, believing that under the law, the lands belonged to the plaintiffs; the mistake was one of law, and no action at the common law or in equity lies to recover the money thus paid. Page 17.
>
> This section—referring to section 762 of the Revision—does not contemplate an error of judgment as to the law respecting the title of the land committed by the tax payer. It was not intended to protect him against errors or mistakes of law committed by himself. The simple claim is, that the plaintiffs paid the taxes voluntarily with full knowledge of all the facts upon which they based their claim of ownership of the lands, believing and insisting that they were the owners thereof in fee simple; but that it was afterwards decided by a competent court that they had no title thereto. Page 18.

It will thus be seen that the sole ground upon which the right of recovery was denied, was, that the payment of the taxes had been voluntary.

In *Garrigan vs. Knight*, 47 Iowa, 525, it was held that —

> When the title to real estate is in controversy, and the taxes thereon are voluntarily paid by one of the parties to the controversy, whose claim is afterwards adjudged to be invalid, he cannot recover the amount so paid from the owner.

The decision in this case has never been overruled otherwise than by being in conflict with later decisions in the numerous "Goodnow cases," of which the case at bar is one.

In the first of these cases, that of *Goodnow vs. Moulton*, 57 Iowa, p. 555, prosecuted by Goodnow as assignee of the Homestead company for the recovery of part of these same taxes, the

defense of voluntary payment having been relied upon, and the case of *Homestead Company vs. Valley Railroad*, having been cited as authority, the Supreme Court of Iowa, very strangely overlooking the above quoted paragraph of the opinion in that case say, in their opinion, page 560:

> We have looked in vain for anything in the statement of the questions involved or the opinion of the court, which tends to show, with any degree of certainty, that the right of the plaintiff to recover the taxes paid was in the case.

And more strangely still, subsequently, in *Goodnow vs. Stryker*, in 14 N. W. Reporter, 345, after having discovered the oversight in the Moulton case, it is said:

> Since the decisions in *Goodnow vs. Moulton*, we cannot follow the decision in *Iowa Homestead Company vs. Des Moines Navigation & Railroad Company*.

The question of voluntary payment having been thus disposed of, it became necessary for plaintiff in error to insist upon the decision in *Homestead Company vs. Valley Railroad* as an adjudication of the cause of action.

While it is true that Goodnow's assignor, the D. & S. C. R. R. Co., was not a party of record, in the case of the *Homestead Company vs. The Valley Railroad*, it is abundantly shown by the record that it was the real, substantial plaintiff in the case, owning and controlling a majority of the homestead company stock and managing its business; that a majority of the directors of the homestead company were also directors of the railroad company, and that the suit was directed and controlled by the railroad company. The testimony upon this point, very briefly indicated, was as follows:

John B. Thompson (Rec., pp. 86–8) says he was *treasurer* and *secretary* of the *Homestead company* from 1864 to 1873; that within a year after Morris K. Jesup became president of the Dubuque & Sioux City Railroad Company—which, according to Jesup's own testimony (Rec., p. 95) was in the early part of the year 1866—the *railroad company* became the owner of *five-*

ninths of the stock of the Homestead company, and that after such change in the ownership of the stock *the board of directors of the Homestead company was changed*; and that the railroad company "by owning a majority of the stock, *controlled the Homestead company*;" and that "after Jesup became president of the railroad company, all stock of the homestead company held by the directors of the railroad company was transferred to the railroad company, amounting to five-ninths of the whole stock." On page 89 of the record the same witness says, referring to the former suit of *The Homestead Company vs. The Navigation Company*, and others: "The Iowa Homestead Company *never paid a dollar of the expenses*. It was never discussed *at the Iowa Homestead Company's meetings*."

Morris K. Jesup (Rec., p. 95), referring to the same suit, in answer to the question, "Who, *on behalf of said railroad company*, had the chief control and direction of said suit, and who employed, consulted with, and generally gave direction to the attorneys who had charge of it," said: "I am president, *and I presume if any directions were given I must have given them;* I do not know."

The following is the

CERTIFICATE.

And now on the application of the defendant, R. B Chapman, it is certified by the court here and ordered to be made part of the record herein, that by his answer and on the hearing in said cause, the defendant claimed immunity from the entire demand and claim of the plaintiff, on the ground that, as he claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Dubuque & Sioux City Railroad Company, by the Supreme Court of the United States, in the case of *The Iowa Homestead Company vs. The Des Moines Navigation & Railroad Company*, this defendant and others, at the October term thereof, A. D. 1872, which case was, as defendant claimed and maintained in this court, prosecuted by said Dubuque & Sioux City Railroad Company, for its own use and benefit, in the name of said Iowa Homestead Company, and that plaintiff's said assignor was therefore in such sense a party to said suit as to be bound and concluded herein by said adjudication therein. And that our decision therein was and is against the immunity so claimed by defendant.

ARGUMENT.

The record presents the following federal question, either decided or the decision of which was necessary to the decree rendered by the Supreme Court of Iowa:

Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, *under the decision and judgment of this court* in the case of *Homestead Company vs. Valley Railroad*, 17 Wall., 153, the controversy therein having been, as plaintiff in error claims, and, as is alleged in his answer, between the same parties, and upon the same issue, and for the same demand, and the decision and judgment therein having been against the validity of such demand.

There having been no opinion filed by the Supreme Court of Iowa, the question decided can only be ascertained by knowing *what issues were made by the pleadings and properly before the court for decision.*

Notwithstanding the present rule of this court, that it will in a proper case examine the opinion of the state court to ascertain what was in fact decided, the rule will hardly be so extended as to require or admit of the examination of *numerous opinions in other cases* to which the state court has, as in this case, simply made reference. But the certificate concludes with the words, "our *decision* herein *was and is against the immunity so claimed* by defendant;" and it is difficult to see why, in the absence of an opinion in the case, this explicit statement by the court should not be taken as conclusive, at least for all the purposes of the pending motion.

Assuming that had Goodnow's assignor, the Dubuque & Sioux City Railroad Company, been a *party of record* in the case of *Homestead Company vs. Valley Railroad*, the defense of former adjudication would present a federal question, it is claimed that while it was not named as a party, it was, as to the taxes in question, the real party in interest and for all purposes the efficient *actor* in that case.

It will be seen by reference to the extracts from the pleadings contained in the statement that the taxes for the years 1861–62–63, were claimed in the same terms, as were those of the subsequent years, as part of the whole amount of $80,000, claimed to have been paid. In *Goodnow vs Litchfield*, 59 Iowa, 226, the defense of former adjudication as to the taxes of the subsequent years was sustained.

If then the issue made in the case of the *Homestead Company vs. Valley Railroad* embraced the taxes for the years subsequent to 1863, it is clear it must also have embraced those in controversy in the case at bar. If it be said that it appears from the evidence in this case that the homestead company, the plaintiff in the former suit, did not pay the taxes here in controversy, but that on the contrary they appear to have been paid by the Dubuque & Sioux City Railroad Company, its assignor, the answer is that the relation of the railroad company to that suit was such that it, and plaintiff as its assignee as well, is in that respect bound by the *claim as made and adjudicated.*

Assuming then that these taxes were claimed in the former suit, was the Dubuque & Sioux City Railroad Company "substantially a party to that action?"

That action involved both the question of title to the lands and the right of plaintiff to be reimbursed the taxes paid by it, in the event of the question of title being decided adversely to it; and it would be a mistake to assume that the railroad company sustained no other relation to it than as warrantor of the title to its grantee, the homestead company.

If the railroad company was in such sense a party as to be bound by the judgment, it can make no difference that the question whether or not it was such party is not a federal question. Plaintiff in error cannot be deprived of his immunity as a party because the fact that the railroad company was also a party, was shown by other than the usual record evidence,

and a question of law was raised as to whether or not the evidence relied on was sufficient.

In *Chicago vs. Robbins*, 4 Wallace, 657, this court, on page 674, stating the rule generally as to when persons other than parties of record are bound by the adjudication, say:

> Persons notified of the pendency of a suit in which they are directly interested, must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn around and evade the consequences which their own conduct and negligence have superinduced.

In *Conger vs. Chilcote*, 42 Iowa, 18, it was held that—

> One that is benefitted by the prosecution of an action of which he has notice, is to be regarded as a party in interest, although his name does not appear therein, and he is bound by the judgment rendered.

And that—

> No particular form of notice is required, and it may be given, either orally or in writing.

The first of these propositions having been in substance held by the court below in an instruction to the jury, the Supreme Court, on pages 23–4, say:

> The instruction clearly announces the rule, that in order to hold defendant so bound, he must be found to have been a party in interest. In such case he would be bound, though his name were not used as a party to the action. We understand the instruction, so far, to mean this: If the action was prosecuted *in whole or in part for defendant's benefit*, if he were to share in the fruits of the judgment, he is to be regarded as a party in interest, and in that case he is bound by the judgment rendered therein. We think there can be no doubt of the correctness of the rule. If he had such an interest in the matter involved in the action, and entrusted it to the Mt. Pleasant bank for settlement by suit, he will be estopped to deny the matters adjudicated therein.

In *Stoddard vs. Thompson*, 31 Iowa, 80, the material facts, briefly stated, were as follows: Thompson having wrongfully obtained possession of a note belonging to Stoddard, made by one Wilson, and commenced suit against Wilson for its collection, Stoddard employed counsel to commence the action,

agreed with Wilson to pay the cost of defending, and was a witness in the case. The defense set up was that Stoddard, and not Thompson, was the owner of the note. Judgment on this issue was rendered in favor of Thompson. Stoddard subsequently commenced the suit, the decision in which is here cited, against Thompson and others, to enjoin the collection by Thompson of the Wilson judgment and certain other notes obtained by him of Stoddard at the same time and under the same circumstances that the Wilson note was obtained. He was entitled to relief asked as to the notes, but not as to the judgment. The court, in the opinion, page 82, referring to the issue as to the ownership of the Wilson note made in the former suit, say:

> The issue thus made was determined in favor of Thompson, and plaintiff, Stoddard, *though not a party to the suit*, is bound by the adjudication. One who, *though not a party*, defends or prosecutes an action *by employing counsel, paying costs, and by doing those things which are usually done by a party*, is bound by the judgment rendered therein.

If, as seems to be well settled, parol evidence is admissible to show what was the matter or issue tried in a former suit, the judgment in which is offered in evidence in a subsequent suit, when that fact does not appear from the record— see *King vs. Chase*, 15 N. H., 9, *Miles vs. Caldwell*, 2 Wall., 35—it ought to be admissible to show also by parol who of the parties in interest were *actual contestants* in a former suit, the judgment in which is offered in evidence in a subsequent suit, where the names of any of them are not shown by the record.

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